TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 10

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY, PETITIONER,

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1939.

CERTIORARI GRANTED APRIL 17, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 702

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY, PETITIONER,

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

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[fol. 4] **IN THE BALTIMORE CITY COURT**

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C., a Corporate Instrumentality of the United States of America,

vs.

M. LUTHER PITTMAN, Clerk of the Superior Court of Baltimore City

PETITION FOR WRIT OF MANDAMUS—Filed March 12, 1938

To the Honorable, the Judge of said Court:

The petition of Home Owners' Loan Corporation, of Washington, D. C., a corporate instrumentality of the United States of America, for a writ of mandamus, respectfully represents:

1. That the Petitioner is a corporate instrumentality of the United States of America, organized, existing and operating pursuant to Section 4 of Public Act No. 43, 73d Congress, approved June 13, 1933, known as the Home Owners' Loan Act, as amended (12 U. S. C. A. Chapter 12, Section 1461 to 1463a inclusive) whose entire capital stock is owned by the United States, and as such has been operating in the several states, and in the State of Maryland; and

2. That in the due course of your Petitioner's operations, a certain Martin J. Burns and Mary Burns, his wife, of Baltimore, Maryland, conveyed unto your Petitioner, by way of the execution and delivery of a mortgage dated the 11th day of March, 1938, (a copy of which is filed herewith, marked "Petitioner's Exhibit No. 1" and prayed to be taken as a part hereof) a leasehold estate and term of 99 years from June 10, 1893, renewable from time to time forever and subject to the payment of an annual ground [fol. 5] rent of Forty-Two Dollars and Twenty-Five Cent ($42.25) in and to the dwelling property in Baltimore City, known as No. 435 East 27th Street and particularly described as follows:

"Beginning for the same on the south side of 27th Street (formerly Oxford Street) at the distance of one hundred

thirty-four feet west of the York Road and running thence westerly on the south side of 27th street thirteen feet then southerly parallel with the York Road ninety feet to the north side of an alley ten feet wide thence easterly along said alley with the use thereof in common thirteen feet and thence northerly in a straight line ninety feet to the place of beginning."

to secure the repayment of an advance by your Petitioner to said mortgagors of One Hundred and Eleven ($111.00) Dollars, said advance having been made for the sole purpose of defraying the costs of certain repairs and reconditioning to said property which were necessary to preserve the said property as security for an original loan made to said mortgagors by your Petitioner on July 11, 1934; and

3. That to preserve and to protect its lien and to enjoy the full benefits of the mortgage, it is a legal necessity under the laws of Maryland that said mortgage be recorded among the land records of the City of Baltimore as required and directed by the statutes of said state in such cases made and provided; and

4. That M. Luther Pittman is the duly qualified Clerk of the Superior Court of Baltimore City, and under the provisions of Article 4, Section 38 of the Constitution of Maryland, he, as such Clerk of the Superior Court, is entrusted with the land records of said City of Baltimore, and it is his duty to receive and record all deeds, mortgages, conveyances and other papers entitled or required by law to be recorded in said land records of said City; and

5. That on the 12th day of March, 1938, your Petitioner appeared, through its agent and employee, at the office of the Clerk of Superior Court in the City of Baltimore during the hours when said office was open for the transaction [fol 6] of business, the said date being a business day and not a Sunday or holiday, and then and there tendered to the said M. Luther Pittman, Clerk as aforesaid, the aforementioned mortgage duly executed and acknowledged, and in all respects ready and eligible for recording under the registration laws of said State of Maryland, together with a fee of Two Dollars and Fifty Cents ($2.50), the lawful charge for recording said instrument as stated by the said M. Luther Pittman, Clerk as aforesaid, and did then and there request and demand that said mortgage be received

and recorded among the land records of the City of Baltimore as by law provided in such cases; and

6. That the said M. Luther Pittman, Clerk as aforesaid, upon tender of said mortgage for recordation and the usual fee exacted therefor as fixed by law, did then and there refuse to receive the same for recordation, and refused to record the same unless and until your Petitioner paid to him for the use of the State of Maryland, in addition to the aforesaid usual fee for recording, a recording tax of Fifty Cents (50c), and also unless and until State of Maryland documentary stamps amounting to Twenty Cents (20c) in cost were purchased, affixed to said mortgage, and cancelled; and

7. That the stamp and recording tax damanded of your Petitioner by said M. Luther Pittman, Clerk as aforesaid, is an excise tax arising under the provisions of Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland for 1937, imposed upon deeds, mortgages (except purchase-money mortgages), bills of sale, contracts of sale, and other instruments; and is in nowise a service charge for the labor, time and material expended and incident to recording; and

8. That your Petitioner, both by reason of the provisions of Section 4 (c) of the Home Owners' Loan Act of 1933 as amended (48 Stat. 129), and the fact that it is an instrumentality of the United States, is immune and exempt from state taxation of any character upon its franchise; its bonds, notes, mortgages, deeds of conveyance, loans, capital, reserves or income; except that its real estate is taxable, as such, to the same extent as other real property is taxed [fol. 7] according to its value; and the attempted collection of said stamp and recording tax upon the mortgage herein described by said M. Luther Pittman, Clerk as aforesaid, is an unlawful interference with the lawful operations of your Petitioner, placing a burden, impediment, and obstruction upon its functions and thus operating to hinder, delay, and embarrass your Petitioner in the exercise of the duties imposed upon it by a law of the Congress of the United States and contravening Article VI, Clause 2 of the Constitution of the United States; and your Petitioner avers that the State of Maryland is not empowered to impose said tax on said mortgage, and that the said M. Luther

Pittman, Clerk as aforesaid, has no right to delay, hold up, or refuse to record said mortgage because of non-payment of said recording tax and the failure to purchase, affix, and cancel the documentary stamps as aforesaid, and that his refusal to record said mortgage will result in great injury to your Petitioner; and

9. That your Petitioner in its operations under the said Home Owners' Loan Act of 1933 and amendments thereto, in assisting the home owners in Maryland who were in involuntary default on mortgages and other liens held against their homes, which they were unable to refinance with private lending agencies, consummated 15,940 refinancing loans secured by first mortgages on dwelling properties and aggregating in amount the sum of $45,579,933.00, and since the closing of said refinancing loans it has become necessary to foreclose many of said mortgages by reason of insoluble defaults in the performance of the covenants contained therein, and that your Petitioner has acquired title to more than 2,000 separate and distinct properties, and as time advances it will of necessity, in the pursuit of its liquidating program, become the owner of other properties through foreclosure or otherwise, and eventually said acquired properties necessarily will be disposed of by deeds of conveyance to purchasers, which deeds, and other instruments in writing necessary to your Petitioner's future conveyancing operations, will be required to be recorded. All of which is related to the Court as an indication of the public nature and importance of the question here at issue; and

[fol. 8] 10. That this is an action of mandamus brought by your Petitioner against M. Luther Pittman, Clerk as aforesaid, to require him under orders of this Court to receive and record the mortgage herein referred to, upon payment of the usual and ordinary legal fee for said service; and your Petitioner avers that it otherwise has no clear, adequate, and speedy remedy in the ordinary course of law, and hence brings this action to obtain relief.

Wherefore, your Petitioner prays:

1. That a writ of mandamus be issued commanding and compelling M. Luther Pittman, Clerk of the Superior Court of Baltimore City, to receive forthwith the aforementioned mortgage and to record it among the Land Records of Balti-

more City upon the payment of the ordinary and usual recording fee therefor, without the payment of said recording tax or the affixation of said documentary stamps.

2. That judgment be entered in favor of your Petitioner that it recover of the defendant, M. Luther Pittman, Clerk as aforesaid, its costs.

John I. Rowe, Thomas E. Barrett, Jr., Risque W. Plummer, Attorneys for Petitioner. Herbert L. Grymes, State Manager.

Duly sworn to by Herbert L. Grymes. Jurat omitted in printing.

[fol. 9] ORDER TO SHOW CAUSE

Ordered this 12th day of March, 1938, by the Baltimore City Court upon the foregoing Petition, Affidavit and Exhibit, that a rule be and it is hereby laid on the said M. Luther Pittman, Clerk of the Superior Court of Baltimore City, requiring him to show cause on or before the 31st day of March, 1938, why the Writ of Mandamus should not be issued as prayed; provided a copy of this Order be served on the said M. Luther Pittman, Clerk as aforesaid, on or before the 18th day of March, 1938.

Edwin T. Dickerson.

PETITIONER'S EXHIBIT NO. 1, FILED WITH PETITION FOR WRIT OF MANDAMUS

HOLC Form R-60, Maryland

Approved 9-29-36

This Mortgage, made this 11th day of March, 1938, by and between Martin J. Burns and Mary Burns, his wife, of the City of Baltimore, State of Maryland, Mortgagors and Home Owners' Loan Corporation, Mortgagee.

Whereas, the Mortgagors are indebted unto the Mortgagee in the sum of One Hundred and Ten ($110.00) Dollars, with interest to accrue thereon at the rate of five per centum per annum, which sum with interest the Mortgagors hereby covenant to pay the Mortgagee at its office in Balti-

more, Maryland, at the expiration of one day after the date [fol. 10] hereof (said sum having been advanced to defray cost of necessary repairs to the hereinafter referred to property).

Whereas, said Mortgagors are desirous of securing the prompt payment of said mortgage debt, with interest as aforesaid, and the performance of the other covenants herein contained; these presents are executed.

Now Therefore This Mortgage Witnesseth, that for and in consideration of the premises and the sum of One Dollar ($1.00) and other valuable considerations, the Mortgagors do hereby grant and convey unto the said Mortgagee, its successors and assigns, all that lot of ground situate in the City of Baltimore, State of Maryland, and described as follows:

All that lot of ground and premises known as No. 435 East Twenty Seventh Street and more fully described in a mortgage from the Mortgagors herein to the Mortgagee herein dated July 11th, 1934, and recorded among the Land Records of Baltimore City in Liber S. C. L. No. 5460, folio 516, to which mortgage reference is hereby made for a more complete description.

Together with the buildings and improvements thereon and the rights, roads, ways, waters, privileges, appurtenances and advantages thereto belonging or in anywise appertaining.

To Have and to Hold the aforesaid parcel of ground and premises unto and to the proper use and benefit of the Home Owners' Loan Corporation, its successors and assigns, for the residue of the term unexpired therein, with the right of renewal forever, subject to an annual rent of $42.25.

Provided, That if the Mortgagors shall make the payments and perform the covenants herein on their part contained, then this mortgage shall be void.

The Mortgagors hereby covenant that a default under any prior Mortgage shall constitute a default hereunder and the full amount, together with interest due under this Mortgage shall become immediately due and payable.

[fol. 11] The Mortgagors do hereby declare their assent to the passing of a decree by the Circuit Court of Baltimore, or the Circuit Court No. 2 of Baltimore City, for a sale of the property hereby mortgaged, in accordance with Chapter 123, Sections 720 to 732, inclusive, of the Laws of Maryland

passed at the January session in the year 1898, or any amendment or additions thereto.

And, in case of any default in the payment of said mortgage debt or interest, when payable or in any covenant or condition of this mortgage, then the entire mortgage debt shall be due and it shall be lawful for the said Mortgagee, its successors or assigns, or Thomas E. Barrett, Jr., and Peter M. Siewierski, or either of them to sell the property hereby mortgaged or so much thereof as may be necessary, to satisfy said debt, interest and all costs incurred in making such sale (Under Article 66, Section 6 to 10 of the Maryland Code, Public General Laws, or any other General or Local Laws relating to Mortgages) and to grant the said property to the purchasers thereof, his, her, or their personal representatives or assigns.

And provided further that Mortgagors shall retain the exclusive right of possession of the said property, and all rights, benefits and liabilities concurrent therewith, until such time after a default in the aforementioned Mortgage between the parties hereto, dated July 11th, 1934, or in the above premises as said Mortgagee, in its discretion, shall demand possession thereof by an instrument in writing addressed to Mortgagors at 435 East Twenty Seventh Street, Baltimore, Maryland, and deposited in the United States Mail, registered and postage prepaid.

Wherever the context hereof requires the plural number as used herein shall include the singular.

Witness the hands and seals of the Mortgagors.

Martin J. Burns. (Seal.) Mary A. Burns. (Seal.)

Test: Edward C. Golder.

[fol. 12] STATE OF MARYLAND,
City of Baltimore, to wit:

I Hereby Certify, that on this 11th day of March, 1938, before me a Notary Public of the State of Maryland, in and for Baltimore City, personally appeared Martin J. Burns and Mary Burns, his wife, the Mortgagors named in the aforegoing Mortgage, and they acknowledged the aforegoing Mortgage to be their act. At the same time also appeared Thomas E. Barrett, Jr., agent of said Mortgagee, and made oath that the consideration set forth in said Mortgage is true and bona fide as therein set forth, and also

made oath that he is the agent of said Mortgagee authorized to make this affidavit.

Edward C. Golder, Notary Public. My commission expires the 1st day of May, 1939. (Seal.)

Rule Answer.

IN BALTIMORE CITY COURT

DEMURRER TO THE PETITION FOR WRIT OF MANDAMUS—Filed March 30, 1938

To the Honorable, the Judge of said Court:

M. Luther Pittman, Clerk of the Superior Court of Baltimore City, defendant herein, by Herbert R. O'Conor, Attorney General, and William L. Henderson, Assistant Attorney General, his attorneys, demurs to the petition for writ of mandamus, exhibited against him, and to each and every paragraph thereof, and for reasons thereof says:

1. That the same is bad in substance and insufficient in law;

2. That the petition does not state such a cause of action as to entitle the petitioner to the relief prayed;

[fol. 13] 3. That the petitioner is not performing such a governmental function as to entitle it to immunity from the stamp and recordation tax referred to;

4. That the petitioner is not exercising any function within the powers delegated to the National Government by the Federal Constitution;

5. That the petitioner in making said loan is not exercising a public function;

6. That the petition does not show that the payment of the stamp and recordation tax referred to, imposes any burden upon the petitioner;

7. And for other and further reasons to be shown at the hearing.

Herbert R. O'Conor, Attorney General; Wm. L. Henderson, Asst. Attorney General, Attorneys for Clerk of the Superior Court.

Reasons filed and Issue joined (short) on the Demurrer.

IN BALTIMORE CITY COURT

ORDER OVERRULING DEMURRER

6th May, 1938—Demurrer to the Petition for a Writ of Mandamus "Overruled" with leave to answer within 30 days (Judge Dickerson).

[fol. 14] IN BALTIMORE CITY COURT

SYLLABUS

The legislation under which the Home Owners' Loan Corporation was created is a constitutional exercise of the powers of the National Government.

The corporation is an instrumentality of the Federal Government, and, as such, is subject only to such taxation as shall be permitted by Congress.

The documentary and recording taxes on mortgages, prescribed by Chapter 11, Section 4, Paragraph 213, of the 1937 Special Session of the Maryland Legislature, are an indirect tax upon loans made by the corporation, and are within the prohibition of the Home Owners' Loan Act of 1933, as amended.

MEMORANDUM—Filed May 6, 1938

DICKERSON, J.:

The Home Owners' Loan Corporation has petitioned this Court for a writ of mandamus to compel M. Luther Pittman, Esq., Clerk of the Superior Court of Baltimore City, to receive and record a certain mortgage, a copy of which was filed with the Petition as an exhibit, upon payment of the usual recording fee, but without payment of the recording tax and affixation of the documentary stamps prescribed by Paragraph 213, et seq., Section 4, of Chapter 11 of the Acts of the General Assembly of Maryland, passed at the 1937 Special Session.

The case was heard on demurrer to the Petition and the following questions were raised:

1. Whether the Petitioner is performing a governmental function, so as to entitle it to immunity from the tax complained of.

2. Whether it is exercising any function within the powers delegated to the National Government by the Federal Constitution.

[fol. 15] 3. Whether the tax complained of will impose any burden upon the Petitioner.

The Petitioner avers that it is a corporate instrumentality of the United States, organized, existing and operating in the several States, including Maryland, pursuant to Acts of Congress, and that its entire capital stock is owned by the United States; that in the course of its operations it received, as security for a loan, a certain mortgage, a copy of which was filed as an exhibit, and particularly set forth in the Petition, on certain leasehold property located in Baltimore City; that in order to fully protect its mortgage, it was necessary to have it recorded, and that on March 12, 1938, it tendered the mortgage to the Respondent for recordation, together with the usual recording charges, but that the Respondent refused to receive the mortgage for record, without affixation of the documentary stamps and payment of the recording tax of fifty cents prescribed by the Act of the Maryland Legislature above referred to.

It is further alleged that the documentary stamps and recording tax are in nowise a service charge incident to recording. The Petitioner claims that as an instrumentality of the National Government, it is immune from taxation, except as provided by the Legislation under which it was constituted, and that the attempted collection of the tax complained of is an unlawful interference with and burden upon its operations. It is further alleged that in assisting home owners, in involuntary defaults on loans, it has preserved their homes through refinancing, and that its operations in the State of Maryland aggregated 15,940 in number, and $45,579,933 in amount; that through foreclosures in this State it has acquired 2,000 separate pieces of property and, pursuant to its liquidating program, a great deal of recording will be required, all of which is recited as evidence of the alleged public nature and importance of the questions involved. Finally, it is claimed, that it has no legal remedy other than the one involved in these proceedings. Whether the Petitioner will, in the course of its operations, exact the tax from the borrower or grantee, or

whether having paid the tax, it will pass it on to the borrower or grantee, is not disclosed, but whichever will even-
[fol. 16] tuate, has been held immaterial to the determination of the questions involved. Federal Land Bank vs. Crosland, 261 U. S., 374, 378.

In that case, mandamus proceedings were instituted to compel recordation of a Federal Land Bank mortgage without payment of the prescribed tax. While the case turned principally upon the holder's option to record the mortgage or not, the Supreme Court said:

"It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The Statute says that the lender must pay the tax, but whoever pays it, it is a tax upon the mortgage and that is what is forbidden by the law of the United States."

The tax complained of was imposed by Section 4, Paragraph 213, et seq., of Chapter 11 of the Acts of the Special Session of the Maryland Legislature of 1937, which impose a tax of ten cents for each $100, or fractional part thereof, of the actual consideration paid or to be paid for the property transferred, and in addition, a tax of fifty cents on each such instrument recorded or offered to be recorded, with the exception of certain instruments mentioned in the Statute. This is clearly a tax and not a service charge incident to recording.

Home Owners' Loan Corp. v. Anderson (Ken.) 64 Pac. 2nd, 14, 15.

Arkansas City B. & L. Asso. v. Murray, 127 Kan. 208.

Wheeler v. Weightman, 96 Kan. 50.

In the Anderson case, the Petitioner sought to avoid compliance with a State mortgage registration fee, held to be a tax, and the Court definitely held that the Petitioner was not subject to the imposition of the tax, and said:

"There can be little doubt that as operated at the present time, the Home Owners' Loan Corporation is an instrumentality of the Federal Government comparable to the United States Bank dealt with in McCulloch v. State of Maryland, 4 Wheaton, 316, 4 L. Ed. 579. The United State-
[fol. 17] Supreme Court has held that such instrumentalities were not required to pay tax on mortgages offered for registration."

Federal Land Bank v. Crosland, supra, page 378, where the Supreme Court said, with reference to a similar document, offered for record by the Federal Land Bank of New Orleans:

"Of course the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case, the Legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax * * *. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach."

Smith v. Kansas City Title Co., 255 U. S. 180, 212.

In the recent case of State Tax Commission of Maryland v. Baltimore National Bank and Reconstruction Finance Corporation, Intervenor, Daily Record, May 2, 1938, Judge Offutt, in his opinion, has very definitely described the status of governmental agencies of the character of the Petitioner in the instant case, which so closely approximates the Reconstruction Finance Corporation, in the following language:

"Whatever may be said of the danger that the swift currents of the ever widening whirlpool of Federal activities will carry beyond the taxing power of the States so much property as to threaten the very existence of our dual form of government, it cannot be denied, that the primary and essential duty of the national government in that crisis was to prevent if possible the complete collapse of the nation's credit, irreparable damage to its commerce and industry, and the chaos and disorder which were likely to follow. Nor can it be denied that the Reconstruction Finance Corporation as the agency employed to grant that aid was an essential instrumentality of the national government created and existing to perform governmental function of the highest possible importance. Every reason advanced [fol. 18] by the Courts in support of the immunity of national banks, and the Federal Reserve Bank from State taxation applies with at least equal force to the Finance Corporation. Neither performs a function more immediately

essential to the continuance and integrity of the national government * * *. Nor is there rational support for the theory that the use of the nation's resources to avert a common national disaster is beyond the natural and legitimate scope of the powers granted to the national government 'in order to form a more perfect Union, establish Justice, insure domestic Tranquil-ity, provide for the common defence, promote the general welfare.'"

There is greater reason for holding the Petitioner in the instant case a governmental instrumentality than in the case just referred to. Its operations are confined to the lending of money on homes, in order to extricate home owners from otherwise insoluble financial difficulties, in connection with loans on their homes; its stock is owned entirely by the United States, which guarantees the payment of principal and interest of its securities, and its funds are under the control of the National Treasury. To hold unconstitutional the legislation under which the Home Owners' Loan Corporation was constituted, would require clear evidence of conflict with the constitution. A situation which presents only reasonable doubt will not justify a conclusion of unconstitutionality.

Legal Tender Cases, 12 Wallace, 531.

It is provided in Article 6 of the Constitution that the Constitution and all legislation in pursuance of, and all treaties made under its authority, shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.

By Section 8 of Article 1, authority is conferred on the National Government to make all laws which may be necessary and proper for carrying into execution the powers conferred by the Constitution upon the National Government, and all other powers vested in the National Government, or any department thereof, by the Constitution.

In the great case of McCulloch v. Maryland, 4 Wheaton, 316, 421, 436, Chief Justice Marshall said:

[fol. 19] "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

"* * * the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is * * * the unavoidable consequence of that supremacy which the Constitution has declared."

Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 212.

Osborn v. Bank of U. S., 9 Wheaton, 738, 859.

In the earlier case of State Tax Commission v. Baltimore National Bank, 169 Md. 65, stock held by the Reconstruction Finance Corporation in the Baltimore National Bank was held taxable because Congress had not at that time withdrawn from the States permission to tax shares of stock in national banks, and on this ground alone, the Supreme Court of the United States affirmed the decision of the Court of Appeals of Maryland.

297 U. S. 209.

The permission to tax stock in national banks was withdrawn by the Act of Congress of March 20, 1936, referred to by Chief Judge Bond in his concurring opinion in the recent case of State Tax Commission vs. Baltimore National Bank, et al., supra, and on the ground that the authority to tax had been withdrawn, the Court of Appeals of Maryland held in that case that the stock of the Baltimore National Bank, owned by the Reconstruction Finance Corporation, was not subject to taxation.

Chief Judge Bond said:

"It is taken as settled that stock in national banks may be taxed only by consent of the United States Congress. People v. Weaver, 100 U. S. 539, 543; Talbot v. Silver Bow County, 139 U. S. 438, 440; Davis v. Elmira Savings Bank, [fol. 20] 161 U. S. 275, 283; Tax Commission v. Baltimore National Bank, 169 Md. 68."

He further said:

"A broad question whether the powers with which the Finance Corporation was invested by the terms of the Act under which it was formed * * * could constitutionally be exercised at all by the Federal Government, was raised on the former appeal, and in the Supreme Court appears to have been taken as beyond dispute."

By express provisions of the Home Owners' Loan Act of 1933, as amended, its franchise, capital, reserves, surplus, its loans and income, were declared exempt from State taxation, while permission was given to tax its real estate. While the term "mortgage" is not used in the exemption, a registration tax was held to be an indirect tax upon the mortgage in the case of Home Owners' Loan Corporation v. Anderson, supra, and it is a fair construction of the Statute that Congress meant not only to exempt the loan, but all of its incidents, including the documents by which it should be evidenced.

In Federal Loan Bank v. Crosland, supra, and Federal Loan Bank v. Hubbard, 163 Va. 860, it was held that the States have no power to tax mortgages or other instruments of writing, evidencing loans made in connection with the operation of Federal Land Banks, and while these cases, as well as the State Tax Commission v. Baltimore National Bank, et al., supra, relate to other governmental instrumentalities, the analogy between them and the instant case is so close that they definitely indicate the immunity of the Petitioner in the instant case from liability for the tax complained of.

In People v. Graves, 57 Supreme Court, 269, 272, the General Counsel of the Panama Railroad Company, a governmental instrumentality, was held not to be subject to an income tax prescribed by the State of New York. In that case, the Supreme Court very broadly stated:

"The power of the Federal Government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since McCulloch vs. Maryland, 4 Wheaton, 316. * * * The [fol. 21] Panama Railroad Company was acquired and has been utilized in virtue of that power. The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

In South Carolina v. United States, 199 U. S. 437, 463, it was held that when a State engages in proprietary functions, its property so used may be subjected to Federal taxation, and this declaration was affirmed in Helvering v. Therrell, 58 S. Ct. 539, 542, and in Heldering v. Powers, 293 U. S. 214, 225-6, but the converse of this proposition is not

true, because when once the concession is made that the instrumentality is governmental in character, its property, funds and franchises are only subject to such State taxation as the National Government shall permit.

McCulloch v. Maryland, supra, p. 435-6.

Jaybird Mining Company v. Weir, 271 U. S. 609, 613, where the Court said:

"It is elementary that the Federal government in all its activities is independent of State control. This rule is broadly applied. And without congressional consent, no Federal agency or instrumentality can be taxed by State authority. 'With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat., 316.' "

Graves v. Texas, 298 U. S. 393, 401.

The fact that the tax involved in the instant case amounts to the trifling sum of seventy cents in no way affects the immunity claimed.

Indian Motorcycle Co. v. U. S., 283 U. S. 570, 575, where the Court said:

"Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."

[fol. 22] The language of Chief Justice Marshall in McCulloch vs. Maryland, supra, p. 429, is most pertinent in this connection:

"All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation * * *"

In the case of Smith v. Kansas City Title & Trust Co., supra, pp. 211-12, while the Supreme Court was dealing with a Federal Land Bank, it said very broadly:

"Deciding, as we do, that these institutions have been created by Congress within the exercise of its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows."

If the doctrine announced in South Carolina vs. U. S., supra, were of reciprocal application, the contention of the Respondent that the tax could be lawfully imposed, would be unanswerable, but that contention ignores the supremacy of national legislation under the Constitution, and is fully answered by the recent decision of our Court of Appeals in State Tax Commission vs. Baltimore National Bank, et al., supra.

I conclude that the Home Owners' Loan Corporation has been constitutionally created under the implied powers of the National Government; that it is an instrumentality of that government, and that is is subject only to such State taxation as the statutes creating it permit; that the documentary and recording taxes complained of, though indirect, are nevertheless, taxes sought to be imposed upon loans of the Petitioner, and within the Congressional prohibition, and that the Petitioner is immune from the imposition of those taxes.

The demurrer to the Petition will, therefore, be overruled.

[fol. 23] IN BALTIMORE CITY COURT

ORDER GRANTING WRIT OF MANDAMUS—Filed June 10, 1938

The Demurrer to the Petition, filed in these proceedings, for the issuance of a Writ of Mandamus as prayed in said Petition, having been, upon hearing held in open court, overruled by order of this Court of May 6th, 1938, with leave to the Defendant to file an Answer to the said Petition within 30 days; the said time allowed having elapsed and the Defendant having failed to file an answer; the matters and facts alleged in the said Petition having been taken as true for the purposes of the said hearing on said Demurrer, it is this 10th day of June, 1938, Ordered by the Baltimore City Court that a Writ of Mandamus be issued by the Clerk of this Court directed to M. Luther Pittman, Clerk of the Superior Court of Baltimore City, commanding him to receive and record a mortgage from Martin J. Burns, and Mary Burns, his wife, to the Home Owners' Loan Corporation dated March 11th, 1938, upon the payment of the ordinary statutory recording charge of $2.50 and without the requirement of the affixation of the State of Maryland Documentary

Stamps for the State recordation tax of fifty cents, and it is further ordered that the Defendant pay the costs.

Edwin T. Dickerson.

ENTRY OF APPEAL

Appeal to the Court of Appeals of Maryland on behalf of the Defendant filed the 15th day of June, 1938: Mr. Clerk:

Please enter an appeal to the Court of Appeals of Maryland, in the above entitled case, from the Order of Court passed on June 10th, 1938.

Herbert R. O'Conor, Attorney General; Wm. L. Henderson, Assistant Attorney General, Attorneys for Clerk of the Superior Court.

[fol. 24] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 25] IN COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1938

No. 64

M. LUTHER PITTMAN, Clerk of the Superior Court of Baltimore City,

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C., a Corporate Instrumentality of the United States of America

DOCKET ENTRIES

Appeal from the Baltimore City Court. Filed August 12, 1938.

December 1, 1938. Order affirmed with costs. Opinion filed. Op.—Urner, J. (Parke and Sloan, JJ., dissent).

December 30, 1938. Motion by appellant to Stay Mandate filed and Order by the Court staying Mandate.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 26] IN COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1938

No. 64

M. LUTHER PITTMAN, Clerk of the Superior Court of Baltimore City,

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C., a Corporate instrumentality of the United States of America

OPINION—Filed December 1st, 1938

Judge Urner delivered the Opinion of the Court

Parke and Sloan, J. J. dissent

[fol. 27] In 1937, the General Assembly, by Chapter 11 of the Acts of its Special Session of that year, added to Article 81 of the Code, entitled "Revenue and Taxes", two sections, 213 and 214, under the sub-title "Tax on the Recordation of Instruments in Writing". Section 213 provides:

"A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property; or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages; purchase money mortgages, absolute or partial releases, or orders of satisfaction."

"The tax hereby imposed shall be at the rate of 10¢ for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and at the rate of 10¢ for each $100, or fractional part thereof, of the principal

amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt."

"In addition to the tax hereby imposed, the Clerks shall collect a charge of 50¢ for each such instrument recorded or offered for record."

Included in Section 214 are these provisions: "No such instrument shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. * * * It shall be unlawful for any person to record any written instrument referred to in this sub-title without having provided for the payment of the tax and [fol. 28] recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction".

The Act of Congress creating the Home Owners' Loan Corporation, (June 13, 1933, c. 64, §1, 48 Stat. 128; U. S. C. A. Ch. 12, Secs. 1461-1468), contains the following tax exemption clauses: "The bonds issued by the Corporation under this sub-section shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

A duly executed mortgage to the Home Owners' Loan Corporation on property in Baltimore City was presented by the Corporation to the Clerk of the Superior Court for the purpose of having it recorded among the land records of the city, but the Clerk refused to receive and record the mortgage because the Corporation declined to pay the recordation tax and charge imposed by the Act of 1937, in addition to the sum of $2.50 specified by the Clerk [fol. 29] as properly payable for recording the instrument. The amount of the recording cost was tendered by the Corporation, but it claimed immunity from the recordation tax charges by virtue of the quoted exemption clause of the Federal statute and because of its character and functions as a governmental agency. The recording of

the mortgage being necessary under the Maryland law for the adequate protection of the mortgagee's interest, the Home Owners' Loan Corporation petitioned the lower Court for the writ of mandamus to compel the Clerk to record the instrument upon payment of the ordinary legal fee for such service. A demurrer by the Clerk to the petition having been overruled, with leave to answer, but that method of defense not having been utilized, the Court ordered that the writ of mandamus sued for be issued. This appeal has resulted.

In our opinion the order below was justified, and its affirmance is required, by the decision of the Supreme Court in the case of Federal Land Bank vs. Crosland, 261 U. S. 374, 67 L. Ed. 103. That decision reversed a decree of the Supreme Court of Alabama which refused to order the recording officer of Montgomery County to record a mortgage on receiving the usual recording fee, but without payment of an additional sum as a recordation tax. In the opinion of the United States Supreme Court, as delivered by Mr. Justice Holmes, the case was stated and discussed, in part, as follows: "The General Revenue Act of the State, approved September 15, 1919, by §361, Schedule 71, (Acts 1919, p. 420) provides that no mortgage [fol. 30] shall be received for record 'unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to wit: * * * upon all instruments which shall be executed to secure an indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one-hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage * * * to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender.' Any probate judge who shall receive a mortgage without collecting the 'recording or registration tax,' &c., is made guilty of a misdemeanor and punished."

"On the other hand, the Federal Farm Loan Act of July 17, 1916, c. 245, §26, provides that first mortgages executed to Federal Land Banks shall be deemed 'instrumentalities of the government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.' 39 Stat. 360, 380. The validity of this provision is not questioned.

Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 207, 212. Of course therefore it must prevail over any inconsistent laws of a State."

"The tax was sustained by the Supreme Court of the State, and the petition for mandamus was ordered to be dismissed on the ground that the payment was optional; that the Federal Land Bank was not required to put its deed on record, and that if it did it must pay whatever [fol. 31] others were required to pay for the registration of its security. But the case is not quite so simple as that. The law of Alabama does make it practically necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so it cannot say that it leaves the Bank free to record or not. The bank has a choice, it is true, but so has one who acts under duress. The Eliza Lines, 199 U. S. 119, 131. * * *"

"Of course, the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the Legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the Courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. D. E. Foote & Co. v. Stanley, 232 U. S. 494. But it has made no such attempt. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach. * * * It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax, but, whoever pays it, [fol. 32] it is a tax upon the mortgage and that is what is forbidden by the law of the United States."

It has been argued for the appellant that the Crosland case is distinguishable because of the provisions in the Federal Farm Loan Act requiring payment of the mortgage recording tax by the lender and declaring mortgages held by the Federal Land Bank to be instrumentalities of the United States. Those differences appear to us immaterial. By the

Federal Act with which this case is directly concerned, the Home Owner's Loan Corporation is expressly declared to be "an instrumentality of the United States", and the mortgages securing its loans are acquired by it in that capacity. Consequently we are unable to differentiate them from mortgages of the Federal Land Bank with respect to such a question as we have now under consideration. The provision for the payment of the tax by the lender was regarded in the Crosland case as having no determining significance.

It was further argued, in effect, that the case of Federal Land Bank v. Crosland, if not distinguishable from the present case, may be disregarded as a precedent because of the trend of later decisions of the Supreme Court, which are said to be at variance with the theory on which that case was determined. The cases cited to support this theory are James V. Dravo Contracting Co., — U. S. —, 82 L. Ed. 125 (Adv. Sheets); Silas Mason Co. v. State Tax Commission of Washington, — U. S. —, 82 L. Ed. 154 (Adv. Sheets); Atkinson v. State Tax Commission of Oregon, — U. S. —, 82 [fol. 33] L. Ed. 440 (Adv. Sheets); Helvering v. Gerhart, — U. S. —, 82 L. Ed. 962 (Adv. Sheets); Allen v. Regents of University System of Georgia, — U. S. —, 82 L. Ed. 975, (Adv. Sheets); and Helvering v. Mountain Producers Corporation, — U. S. —, 82 L. Ed. 607 (Adv. Sheets). In the first three of those cases the Supreme Court was considering questions as to the liability to State income taxes of earnings by contractors in the performance of work for the Federal Government. Each of the other three cases involved the claim of a State agency, or its employees, or the lessee of State property, to immunity from Federal income taxes. None of the opinions in those cases made any qualifying reference to the Crosland case. As the decision in that case was concerned with a question closely analogous to the one here raised, and as it has not been overruled, we may not disregard it upon the theory that it is inconsistent with adjudications of other questions in the later cases which have been cited. The Crosland decision affords an authoritative precedent, and a sufficient ground, for the determination of this case, and hence there is no occasion to analyze in this opinion the principles and limitations of intergovernmental immunity which affect the solution of such a problem as this case has presented.

Order affirmed, with costs.

[fol. 34] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 43,187. Maryland, Court of Appeals. Term No. 702. M. Luther Pittman, Clerk of the Superior Court of Baltimore City, petitioner, vs. Home Owners' Loan Corporation of Washington, D. C. Petition for a writ of certiorari and exhibit thereto. Filed February 25, 1939. Term No. 702, O. T. 1938.

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1939

The petition herein for a writ of certiorari to the Court of Appeals of the State of Maryland is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
FEB 25 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 702 10

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY,

Petitioner.

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND AND ARGUMENT IN SUPPORT THEREOF.

WILLIAM C. WALSH,
Attorney General of the State of Maryland,

WILLIAM L. HENDERSON,
Deputy Attorney General,

H. VERNON ENEY,
Asst. Attorney General,

Attorneys for Petitioner.

The Daily Record Co. Print, Baltimore.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No.

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY,

Petitioner.

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, M. Luther Pittman, Clerk of the Superior Court of Baltimore City, by William C. Walsh, Attorney General of the State of Maryland, respectfully prays for a writ of certiorari herein to review a certain final order and judgment of the Court of Appeals of the State of Maryland, being the highest Court of said State, entered and filed on December 1, 1938, affirming a final order of the Baltimore City Court entered and filed on

June 10, 1938, directing that a writ of mandamus be issued by the Clerk of the Baltimore City Court, commanding your petitioner, as Clerk of the Superior Court of Baltimore City, to receive and record a certain mortgage from Martin J. Burns and Mary Burns, his wife, to the Home Owners' Loan Corporation, dated March 11, 1938, upon the payment of the ordinary statutory recordation charge and "without the requirement of the affixation of the State of Maryland Documentary Stamps nor the State recordation tax of fifty cents" (R. 23).

OPINIONS BELOW.

The opinion of the Court of Appeals of the State of Maryland has not yet been officially reported but it is printed in the record and is unofficially reported in 2 Atl. (2d) 689, (Adv. Sheets). The opinion of the Baltimore City Court is not reported but is printed in the record (R. 14-22).

The decision of the Court below was based solely upon the decision of this Court in *Federal Land Bank vs. Crosland*, 261 U. S. 374, where it was held that a mortgage to the Federal Land Bank was not subject to a recordation tax imposed by an Alabama statute.

JURISDICTION.

The order of the Court of Appeals of the State of Maryland was entered on December 1, 1938. On petition the mandate was stayed pending an application to this Court for a writ of certiorari. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 936; 28 U. S. C., Sec. 344. The Court below held the Maryland statute imposing a recordation tax invalid to the extent that it taxed the re-

cordation of mortgages to the Home Owners' Loan Corporation, on the ground that the Home Owners' Loan Corporation is, under the Constitution and laws of the United States, exempt from taxation on its mortgages; that it is an instrumentality of the Federal government; that it is subject only to such State taxation as the statute creating it permits; and that the imposition of the tax in this case has been prohibited by the Act of Congress creating the Home Owners' Loan Corporation.

STATUTES INVOLVED.

The pertinent statutory provisions are Sections 213 and 214 of Article 81 of the Code of Public General Laws of Maryland (as enacted by Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland of 1937) and the Home Owners' Loan Act of 1933, approved June 13, 1933, Chapter 64; 48 Stat. 128, (12 U. S. C., Secs. 1461-1463a).

The Maryland statutory provisions are as follows:

> "213. A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided however, that said tax shall not apply to assignments of mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction.

"The tax hereby imposed shall be at the rate of 10c for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and at the rate of 10c for each $100, or fractional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt.

"In addition to the tax hereby imposed, the Clerks shall collect a charge of 50c for each such instrument recorded or offered for record.

"214. No such instrument shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. The Comptroller shall supply to the Clerks of the Circuit Courts of the respective Counties or the Clerk of the Superior Court of Baltimore City, stamps to evidence the payment of said tax, for sale to persons offering such instruments for record, under such rules and regulations as the Comptroller may prescribe. The proceeds from the sale of said stamps, together with the recordation charges herein provided, shall be accounted for and paid over to the Comptroller who shall deposit the same in the 'State Fund for Aid to the Needy' to be disbursed therefrom for the purposes and in the manner prescribed by law.

"It shall be unlawful for any person to record any written instrument referred to in this sub-title without having provided for the payment of the tax and recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction. Any person violating the provisions of this sub-title shall be subject to a fine of not more than $500.00 or to a sentence of not more than six months in jail."

It is conceded that this statute imposes a tax and not merely a service charge for recording.

The Home Owners' Loan Act of 1933 is set out in full in the appendix, *infra*, pp. 21-32.

The respondent, Home Owners' Loan Corporation, was created by the Federal Home Loan Bank Board, pursuant to Section 1463a of the Home Owners' Loan Act of 1933, which provides as follows:

> "The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation."

We are here particularly concerned only with that part of Section 1463(c) of the Act which reads as follows:

> "The bonds issued by the corporation under this sub-section shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any estate, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

QUESTION PRESENTED.

The question presented is whether the Clerk of the Superior Court of Baltimore City is required to receive and record a mortgage on Maryland real estate from residents of Maryland to the Home Owners' Loan Corporation without the payment of the Maryland recordation tax of fifty cents and without the said mortgage having affixed to it the State of Maryland Documentary Stamps required to be affixed to other like mortgages in the State of Maryland. More broadly speaking the question is whether the Home Owners' Loan Corporation is a governmental instrumentality of the United States and as such immune from State taxation on the recordation of mortgages to it.

STATEMENT.

The petitioner is the Clerk of the Superior Court of Baltimore City (a court of record of the State of Maryland) and as such, under the laws of Maryland, has charge of the recording of all deeds, mortgages and other like instruments conveying real estate located in Baltimore City (R. 5). A duly executed mortgage to the Home Owners' Loan Corporation on real estate in Baltimore City was presented to the petitioner with the request that the same be recorded among the Land Records of Baltimore City. The correct amount of the statutory recordation charge was tendered but since there were no State of Maryland Documentary Stamps affixed to the mortgage and since the Home Owners' Loan Corporation refused to pay the recordation tax of fifty cents the petitioner refused to accept the mortgage for record (R. 5-6).

Under the Maryland law the recording of the mortgage was necessary for the adequate protection of the

mortgagee (R. 5) and upon the refusal of the petitioner to record the mortgage without the stamps being affixed thereto and without the payment of the special recordation tax of fifty cents, the Home Owners' Loan Corporation filed a petition for a writ of mandamus in the Baltimore City Court (R. 4-12). The petition was demurred to and, the demurrer being overruled, the petitioner herein refused to answer. The Baltimore City Court then passed an order directing the Clerk thereof to issue the writ of mandamus (R. 23). It is conceded that the facts (but not the conclusions of law) stated in the petition are true.

The petition alleges that the Home Owners' Loan Corporation is a corporate instrumentality of the United States organized, existing and operating pursuant to the Home Owners' Loan Act of 1933 (12 U. S. C. Secs. 1461 to 1463a, inclusive) whose entire capital stock is owned by the United States (R. 4). The Home Owners' Loan Corporation has been operating in Maryland as well as in other States and in the course of its operations made a loan of $111.00, payable one day after date, with interest at 5% per annum, to Martin J. Burns and Mary Burns upon the security of a mortgage on certain leasehold property in Baltimore City (R. 4-5). The mortgage was promptly tendered to the petitioner, as the Clerk of the Superior Court of Baltimore City, for record but he refused to record the same unless the tax prescribed by Sections 213 and 214 of Article 81 of the Code of Public General Laws of Maryland was paid in addition to the usual recordation charge which was tendered to him (R. 5-6). The petition further alleges that the stamp and recording tax imposed by said Sections 213 and 214 of the Maryland Code is an excise tax and not

a service charge, and that the Home Owners' Loan Corporation, by reason of the Home Owners' Loan Act of 1933 and the fact that it is an instrumentality of the United States, is immune and exempt from State taxation on its mortgages; and that the attempted collection of the tax is an unlawful interference with its operations, placing a burden, impediment and obstruction upon its functions, and operating to hinder, delay and embarrass it in the exercise of the duties imposed upon it by law (R. 6-7).

As illustrative of the scope of the corporation's operations, the petition alleges that about $46,000,000 have been loaned on mortgages in Maryland since operations were begun and that the corporation has acquired title to about 2,000 separate pieces of property in Maryland (R. 7).

REASONS FOR GRANTING THE WRIT.

The recordation tax on deeds, mortgages and other instruments offered for record was imposed by an Act passed at a special session of the Maryland Legislature in an effort to provide essential revenues for aid to the needy and to match Federal appropriations under the Social Security Act. The statute is not discriminatory; it applies to all alike; and it does not contain any exemptions or exceptions. If, as held by the Court below, an exemption must be written into the Act by the overriding force of the Federal Constitution in favor of the Home Owners' Loan Corporation then a similar exemption must exist as to each of the other numerous lending agencies of the Federal Government. If the claimed immunity is confirmed in this case, then we may expect a similar claim to immunity to be made by the Reconstruction Finance Corporation, the Farm and Crop lending

agencies, the Federal Reserve Banks, the National Banks, the State Banks which are members of the Federal Reserve System, the Federal Savings & Loan Corporations, the Federal Housing Administration and the many other Federal lending agencies too numerous to mention. If so, this legitimate source of State taxation would be substantially impaired because it is common knowledge that a very large percentage of loans made in recent years have emanated from these lending agencies. The question presented is, therefore, one of the utmost importance to the State of Maryland and one which vitally affects a substantial source of revenue.

The case presents to this Court a number of questions of constitutional law on which an authoritative decision by this Court is essential. These questions are: (1) whether the Court below was correct in following the decision of this Court in *Federal Land Bank v. Crosland*, 261 U. S. 374, instead of the reasoning in the more recent decisions of this Court, such as *James v. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. v. State Tax Commission of Washington*, 302 U. S. 186; *Atkinson v. State Tax Commission of Oregon*, 303 U. S. 20; *Helvering v. Mountain Producers Corporation*, 303 U. S. 376; *Helvering v. Gerhardt*, 304 U. S. 405, and *Allen v. Regents of University System of Georgia*, 304 U. S. 439; (2) whether the burden on the Federal Government of a State tax on the recordation of a mortgage to the Home Owners' Loan Corporation, which could be and customarily is paid by the mortgagor, would not be so speculative and so uncertain as not to be prohibited by the Federal Constitution; (3) whether the functions and activities of the Home Owners' Loan Corporation are proprietary, rather than governmental in their nature; and (4) whether the Home Owners' Loan Corporation is immune from State

taxation on the recordation of its mortgages when the tax is not discriminatory but is uniform and imposes no burden which is not borne by private lending agencies.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of the State of Maryland, to review the determination of the Court of Appeals, the court of last resort of the State of Maryland, as provided by law, and that your petitioner may have such other and further relief as may be deemed appropriate. A certified copy of the record in the Court below and of the proceedings in that Court is submitted herewith.

Respectfully submitted,

M. LUTHER PITTMAN,
Clerk of the Superior Court of
Baltimore City.

By WILLIAM C. WALSH,
Attorney General of the
State of Maryland.

WILLIAM L. HENDERSON,
Deputy Attorney General,

H. VERNON ENEY,
Assistant Attorney General,

Of Counsel.

Dated February 25, 1939.

ARGUMENT IN SUPPORT OF PETITION.

SPECIFICATION OF ERRORS.

The Court of Appeals of Maryland erred:

1. In holding that the decision of this Court in *Federal Land Bank v. Crosland*, 261 U. S. 374, was controlling.

2. In failing to hold that the burden of the tax on the Government of the United States was speculative and uncertain, if, indeed, it existed at all in view of the fact that the tax could be and customarily is paid by the mortgagor.

3. In failing to hold that the functions and activities of the Home Owners' Loan Corporation were proprietary rather than governmental in their nature.

4. In holding that the Home Owners' Loan Corporation was entitled to constitutional immunity from the tax.

5. In failing to hold that the Home Owners' Loan Corporation was not immune from the tax in view of the fact that the tax was uniform, operated upon all persons and corporations offering mortgages for record, and did not discriminate against the Home Owners' Loan Corporation or the United States.

ARGUMENT.

The decision of the Court below was based squarely and solely upon the decision of this Court in *Federal Land Bank v. Crosland*, 261 U. S. 374. That case, however, may be distinguished from the case at bar on several grounds. The Alabama statute there involved im-

posed the tax on the lender whereas the Maryland tax is imposed on the recordation of the instrument and is silent as to who shall pay the tax. It is, of course, customarily paid by the borrower and it is within the power of the lender in any case to avoid payment of the tax by requiring its payment by the borrower. It is true that in its opinion in the *Crosland* case this Court pointed out that the tax there under consideration might be collected by the lender from the borrower and stated that this should not make any difference. But the fact remains that the Alabama tax was a tax on the lender whereas the Maryland tax is not. Likewise the decision in the *Crosland* case depended on the provisions of the Federal Farm Loan Act which declared the mortgages to Federal Land Banks to be instrumentalities of the government of the United States and, as such, exempt from Federal, State, municipal and local taxation. There is no such provision in the Home Owners' Loan Act of 1933. The Home Owners' Loan Corporation is declared to be an instrumentality of the United States but its mortgages are not declared to be such instrumentalities although its "loans and income" are declared to be exempt from taxation. Moreover, the Home Owners' Loan Act of 1933 expressly authorizes non-discriminatory taxes on real estate owned by the Home Owner's Loan Corporation and it might well be argued that the Maryland tax is in effect a tax on real estate and thus within the exemption from immunity.

However, we prefer to rest our argument on broader considerations and we are willing to concede that if the decision in the *Crosland* case is still to be considered as a binding precedent in spite of the recent decisions of this Court, then the decision of the Court below was correct.

We rely on three fundamental propositions: first, the Home Owners' Loan Corporation is exercising a proprietary rather than a governmental function, and is, therefore, not entitled to any constitutional immunity from State taxation; second, the Maryland tax is not a burden on the Home Owners' Loan Corporation, or, if it is, the burden is so slight, inconsequential, indirect and speculative as not to be prohibited; and, third, the Maryland tax is uniform and not discriminatory and therefore not prohibited.

I.

THE HOME OWNERS' LOAN CORPORATION IS NOT ENTITLED TO IMMUNITY BECAUSE ITS FUNCTIONS AND ACTIVITIES ARE PROPRIETARY RATHER THAN GOVERNMENTAL IN THEIR NATURE.

Much could be said in support of this proposition. However, the question is now before this Court for determination in the cases of *Graves v. State of New York ex rel. O'Keefe*, No. 478, October Term, 1938 and *State Tax Commission of Utah, v. Van Cott*, No. 491, October Term, 1938.

It seems, therefore, unnecessary to labor the point here. Nevertheless reference might be made to *South Carolina v. United States*, 199 U. S. 437; *Willcuts v. Bunn*, 282 U. S. 216; *Indian Motor Cycle Co. v. United States*, 283 U. S. 570; *Helvering v. Powers*, 293 U. S. 214; *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Helvering v. Gerhardt*, 304 U. S. 405 and *Allen v. Regents of University System of Ga.*, 304 U. S. 439.

Regardless of the beneficent motives behind the lending program of the Congress, of which the activities of

the Home Owners' Loan Corporation are a part, we submit that the lending of money, traditionally and actually, is a proprietary function. Assuming the power of the Congress to lend money for any purpose national in its scope, it is apparent that the distinction between the delegated powers of the Congress, and the broader police powers of the States, furnishes no barrier to the continued extension of Federal activities in proprietary fields. But the question whether the constitutional tax immunity is as broad as the spending power has not been decided. It may be decided in the cases now pending before this Court.

II.

THE MARYLAND TAX IS NOT A BURDEN ON THE HOME OWNERS' LOAN CORPORATION.

Even if it be conceded that the Home Owners' Loan Corporation is a governmental instrumentality of the United States it would not for that reason alone be entitled to the implied constitutional immunity from the Maryland recordation tax, unless the tax was actually and in fact a burden on the Home Owners' Loan Corporation and operated to obstruct or impede its functions and activities.

While it may be true that in some of the earlier cases the Court was concerned chiefly with the question of whether or not the functions of the particular agency involved were governmental or proprietary in their nature, nevertheless the question of whether or not there was a burden also existed. In the more recent cases chief emphasis has been placed upon the question of whether or not the tax in question was in fact a substantial burden and the decisions have turned on

whether or not such a burden existed rather than on whether or not the functions of the particular agency were governmental in their nature. Thus in *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, the majority opinion was devoted almost entirely to the question of whether or not the operation of a municipally owned water system was an essential governmental function, but as pointed out by the Court in *Helvering v. Gerhardt*, 304 U. S. 405, the question of whether or not the tax was any real burden was not raised or considered. And Mr. Justice Roberts, in his dissenting opinion in the *Brush* case pointed out clearly that a tax imposed on a governmental agency is not invalid unless the burden of the tax be "palpable and direct, rather than hypothetic and remote." (300 U. S. 375). In *James v. Dravo Contracting Co.*, 302 U. S. 134, the question of whether or not the activities under consideration were governmental or proprietary in their nature was considered, but the decision of the Court turned on the question of whether or not the tax was a burden on the government. The tax in that case was upheld on the ground that it was not a burden on the government and did "not interfere in any substantial way with the performance of federal functions". See also, *Willcuts v. Bunn*, 282 U. S. 216; *Silas Mason Co. v. State Tax Commission of Washington*, 302 U. S. 186; and *Atkinson v. State Tax Commission of Oregon*, 303 U. S. 20.

But even if there was any doubt that constitutional immunity did not exist when the tax did not directly burden the government and obstruct and impede it in the exercise of its governmental functions, such doubt was removed by the decision of this Court in *Helver-*

ing v. Gerhardt, 304 U. S. 405. There it was tacitly conceded that the functions of the Port of New York Authority were governmental rather than proprietary in their nature, but the validity of the tax was nevertheless upheld and the Court clearly and positively stated the rule that immunity does not exist unless the burden on the State is actual and substantial and not merely conjectural.

In the restatements of the law in these recent cases, we find nothing to indicate that the rule would not be applied reciprocally. It is unlikely that this Court should consider the burden of such an indirect tax as "speculative and uncertain" in the case of a State agency but not in the case of a Federal agency. Moreover, where the denial of immunity was based upon the *remoteness* of the tax, this Court has always applied the rule reciprocally. Many examples might be given; the *Dravo* case, *supra*, is one, dealing with an independent contractor with the Federal Government. In the *Mountain Producers Corp.* case, *supra*, this Court overruled both *Gillespie v. Oklahoma*, 257 U. S. 501, and *Burnet v. Coronado Oil Co.*, 285 U. S. 393, as being "out of harmony with correct principle". It is highly significant that these were converse cases, one involving leases of Federal Indian lands, the other State school lands. This Court also referred to the fact that both Congress and the States were held to have the right to tax bequests to the States or to the United States, *United States v. Perkins*, 163 U. S. 625 and *Snyder v. Bettman*, 190 U. S. 249. Compare also *Indian Motorcycle Co. v. United States*, 283 U. S. 570 and *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, cited in the *Dravo* case.

There can hardly be any doubt but that the burden of the Maryland recordation tax on the Home Owners' Loan Corporation is wholly uncertain and conjectural. Indeed it would seem to be clear that the tax is actually no burden at all on the Home Owners' Loan Corporation. Certainly the tax is not levied against the corporation nor is it paid by the corporation. If immunity is granted to the corporation it will benefit its borrowers who are citizens and residents of the State of Maryland or owners of real estate therein, but will not benefit the corporation. Any contention to the contrary simply ignores the facts.

If the tax is in fact paid by the borrower, what possible burden can there be on the Home Owners' Loan Corporation? The case is even clearer than the *Gerhardt* case. There it could be argued that the income tax on its employees increased the expense of operation of the Port of New York Authority. Yet this Court held that the burden was too conjectural and remote and infringed no constitutional immunity. But in the case at bar not even this remote and conjectural burden exists. The tax does not, either directly or indirectly, increase the cost of operation of the Home Owners' Loan Corporation. Not even the economic burden of the tax is passed on to it. The only advantage which can be derived by the Home Owners' Loan Corporation from a grant of immunity is a purely competitive advantage over private lending agencies.

It seems to us that it can be said that a burden exists only if it be assumed that the function of the Home Owners' Loan Corporation is not merely to lend money to needy persons unable to secure private financing, but to induce persons to borrow money from it rather than

from private lending agencies. If this be its function then the tax would be a burden because it would take away the inducement that exemption from the recordation tax offers. But such an assumption would do violence to the expressed purposes of the Home Owners' Loan Act of 1933 and could hardly have serious consideration.

Actually the Home Owners' Loan Corporation in claiming immunity is seeking exemption from the tax, not for itself but for its borrowers. This Court said in the *Gerhardt* case: "The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure to the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial." In the case at bar the effect of the immunity if allowed would be to relieve private persons of their duty of financial support to the State of Maryland *without securing any advantage whatsoever to the Home Owners' Loan Corporation.*

III.

THE MARYLAND TAX IS UNIFORM AND NOT DISCRIMINATORY AND THEREFORE NOT PROHIBITED.

It is unnecessary to repeat here what has been said previously that the fact that an agency exercises governmental functions does not of itself entitle the agency to constitutional immunity from tax. Just as the tax must constitute a burden on the governmental agency before it will be stricken down, so also it must be discriminatory before it will be held invalid.

In *McCullouch v. Maryland*, 4 Wheat. 316, the first case in which the doctrine of implied constitutional im-

munity was recognized, the tax was clearly discriminatory and it was for this reason that it was held invalid. In later cases the conception that immunity exists only against discriminatory taxes was lost sight of, but in more recent years the trend has certainly been the other way and now the doctrine is firmly established in the decisions of this Court. See dissenting opinion of Mr. Justice Roberts in *Brush v. Commissioner of Internal Revenue*, 300 U. S. 375; *Willcuts v. Bunn*, 282 U. S. 216; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Helvering v. Gerhardt*, 304 U. S. 405.

By no flight of the imagination could the Maryland recordation tax be considered discriminatory. The Home Owners' Loan Corporation is not taxed at all. The borrowers pay no more tax than would be required of them if they borrowed from private lending agencies. A grant of immunity would create discrimination, not do away with it, because a grant of immunity would place the borrowers from the Home Owners' Loan Corporation in a favored position by exempting them from the tax; it would give the Home Owners' Loan Corporation an unfair advantage over private lending agencies; it would tend to discourage loans by private lending agencies and encourage loans by the Home Owners' Loan Corporation. Certainly this is not the result which the Congress desired to achieve.

CONCLUSION.

We feel that it is desirable, in view of the vital importance of the present case to the State of Maryland, that this Court determine whether the loans of the Home Owners' Loan Corporation are immune from the payment of the Maryland recordation tax.

The State of Maryland derives a substantial revenue from this perfectly legitimate source of taxation. If immunity is granted in the case at bar it will be claimed by each of the other numerous Federal lending agencies. The State of Maryland will lose considerable revenue and the Federal Government will gain nothing. Certainly such a result is neither desirable nor necessary.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

WILLIAM C. WALSH,
Attorney General of the State of Maryland,

WILLIAM L. HENDERSON,
Deputy Attorney General,

H. VERNON ENEY,
Asst. Attorney General,

Attorneys for Petitioner.

APPENDIX.

U. S. C.—TITLE 12—BANKS AND BANKING.

§1461. Short title.

This chapter may be cited as the "Home Owners' Loan Act of 1933." (June 13, 1933, c. 64, §1, 48 Stat. 128).

§1462. Definitions.

As used in this chapter—

(a) The term "Board" means the Federal Home Loan Bank Board created under Chapter 11 of this title.

(b) The term "Corporation" means the Home Owners' Loan Corporation created under section 1463 of this chapter.

(c) The term "home mortgage" means a first mortgage on real estate in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed $20,000; and the term "first mortgage" includes such classes of first liens as are commonly given to secure advances on real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 1464 of this chapter. (June 13, 1933, c. 64, §2, 48 Stat. 128; June 27, 1934, c. 847, §508 (a), 48 Stat. 1264; May 28, 1935, c. 150, §10, 49 Stat. 296.)

§1463. Home Owners' Loan Corporation.

(a) *Creation; directors.* The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation.

(b) *Capital stock; subscription by United States; allocation of funds by Reconstruction Finance Corporation.* The Board shall determine the minimum amount of capital stock of the Corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate $200,000,000. Such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments for such subscrpition shall be subject to call in whole or in part by the Board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The Corporation shall issue to the Secretary of the Treasury receipts for payments by him for or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States. In order to enable the Secretary of the Treasury to make such payments when called, the Reconstruction Finance Corporation is authorized and directed to allocate and make available to the Secretary of the Treasury the sum of $200,000,000, or so much thereof as may be necessary, and for such purpose the amount of the notes, bonds, debentures, or other such obligations which the Reconstruction Finance Corporation is authorized and empowered under section 609

of Title 15, to have outstanding at any one time, is hereby increased by such amounts as may be necessary.

(c) *Bond issue by corporation authorized; interest and principal guaranteed by United States; exemption from taxation.* In order to provide for applications filed before May 28, 1935, for applications filed within thirty days thereafter, and for carrying out the other purposes of this section, the Corporation is authorized to issue bonds in an aggregate amount not to exceed $4,750,000,000, which may be exchanged as hereinafter provided, or which may be sold by the Corporation to obtain funds for carrying out the purposes of this section or for the redemption of any of its outstanding bonds; and the Corporation is further authorized to increase its total bond issue for the purpose of retiring its outstanding bonds by an amount equal to the amount of the bonds to be so retired (except bonds retired from payments of principal on loans), such retirement to be at maturity or by call or purchase or exchange or any method prescribed by the Board with the approval of the Secretary of the Treasury: *Provided*, That no bonds issued under this subsection, as amended, shall have a maturity date later than 1952. Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon

demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds of the Corporation issued under this subsection which are guaranteed as to interest and principal, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under Sections 752, 753 and 757 of Title 31, and the purposes for which securities may be issued under such sections are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any state, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed. No such bonds shall be issued in excess of the assets of the Corporation, including the assets to be obtained from the proceeds of such bonds, but a failure to comply with this provision shall not invalidate the bonds or the guaranty of the

same. The Corporation shall have power to purchase in the open market at any time and at any price not to exceed par any of the bonds issued by it. Any such bonds so purchased may, with the approval of the Secretary of the Treasury, be sold or resold at any time and at any price. For a period of six months after the date this subsection, as amended, takes effect, the Corporation is authorized to refund any of its bonds issued prior to such date or any bonds issued after such date in compliance with commitments of the Corporation outstanding on such date, upon application of the holders thereof, by exchanging therefor bonds of an equal face amount issued by the Corporation under this subsection as amended, and bearing interest at such rate as may be prescribed by the Corporation with the approval of the Secretary of the Treasury; but such rate shall not be less than that first fixed after this subsection, as amended, takes effect on bonds exchanged by the Corporation for home mortgages. For the purpose of such refunding the Corporation is further authorized to increase its total bond issue in an amount equal to the amount of the bonds so refunded. Nothing in this subsection shall be construed to prevent the Corporation from issuing bonds in compliance with commitments of the Corporation on April 27, 1934.

(d) *Exchange of bonds for mortgages; amortization of mortgages; interest rates.* The Corporation is authorized, for a period of three years after June 13, 1933, (1) to acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate (including the interest of a vendor under a purchase-money mortgage or contract) recorded or filed in the proper office or executed prior to June 13, 1933, and (2) in connection with any such exchange, to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction, and to pay such amounts, not exceeding $50, to the holder of the mortgage, obligation, or lien

acquired as may be the difference between the face value of the bonds exchanged plus accrued interest thereon and the purchase price of the mortgage, obligation, or lien. The face value of the bonds so exchanged plus accrued interest thereon and the cash so advanced shall not exceed in any case $14,000, or 80 per centum of the value of the real estate as determined by an appraisal made by the Corporation, whichever is the smaller. In any case in which the amount of the face value of the bonds exchanged plus accrued interest thereon and the case advanced is less than the amount the home owner owes with respect to the home mortgage or other obligation or lien so acquired by the Corporation, the Corporation shall credit the difference between such amounts to the home owner and shall reduce the amount owed by the home owner to the Corporation to that extent. Each home mortgage or other obligation or lien so acquired shall be carried as a first lien or refinanced as a home mortgage by the Corporation on the basis of the price paid therefor by the Corporation, and shall be amortized by means of monthly payments sufficient to retire the interest and principal within a period of not to exceed fifteen years; but the amortization payments of any home owner may be made quarterly, semiannually, or annually, if in the judgment of the Corporation the situation of the home owner requires it. Interest on the unpaid balance of the obligation of the home owner to the Corporation shall be at a rate not exceeding 5 per centum per annum. The Corporation may at any time grant an extension of time to any home owner for the payment of any installment of principal or interest owed by him to the Corporation if, in the judgment of the Corporation, the circumstances of the home owner and the condition of the security justify such extension. As used in this subsection, the term "real estate" includes only real estate held in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run

from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed $20,000. No discrimination shall be made under this chapter against any home mortgage by reason of the fact that the real estate securing such mortgage is located in a municipality, county, or taxing district which is in default upon any of its obligations.

For the purposes of this chapter, levies of assessments upon real property, made by any special district organized in any State for public improvements, shall be treated as general-tax levies are treated. The Board shall determine the reasonableness of the total annual burden of taxes and assessments of all kinds upon any property offered as security for the payment of a loan made by the Corporation and the effect of the total levies upon the loanable value of such property, but no deduction shall be made from the loanable value of any property for levies not due at the time of making such loan in any instance where the total annual taxes and assessments borne by the said property for all purposes does not exceed a sum which, in the discretion of the Board, is a reasonable annual tax burden for such property.

(e) *Cash loans on unincumbered property; interest.* The Corporation is further authorized, for a period of three years from June 13, 1933, to make loans in cash subject to the same limitations and for the same purposes for which cash advances may be made under subsection (d) of this section, in cases where the property is not otherwise encumbered; but no such loan shall exceed 50 per centum of the value of the property securing the same as determined upon an appraisal made by the Corporation. Each such loan shall be secured by a duly recorded home mortgage, and shall bear interest at the same rate and shall be subject to the

same provisions with respect to amortization and extensions as are applicable in the case of obligations refinanced under subsection (d) of this section.

(f) *Cash loans on mortgaged property; interest.* The Corporation is further authorized, for a period of three years from June 13, 1933, in any case in which the holder of a home mortgage or other obligation or lien eligible for exchange under subsection (d) of this section does not accept the bonds of the Corporation in exchange as provided in such subsection and in which the Corporation finds that the home owner cannot obtain a loan from ordinary lending agencies, to make cash advances to such home owner in an amount not to exceed 40 per centum of the value of the property for the purposes specified in such subsection (d). Each such loan shall be secured by a duly recorded home mortgage and shall bear interest at a rate of interest which shall be uniform throughout the United States, but which in no event shall exceed a rate of 6 per centum per annum, and shall be subject to the same provisions with respect to amortization and extensions as are applicable in cases of obligations refinanced under subsection (d) of this section.

(g) *Loans to redeem foreclosed property.* The Corporation is further authorized to exchange bonds and to advance cash to redeem or recover homes lost by the owners by foreclosure or forced sale by a trustee under a deed or trust or under power of attorney or by voluntary surrender to the mortgagee subsequent to January 1, 1930, subject to the limitations provided in subsection (d) of this section.

(h) *Appraisal rules.* The Board shall make rules for the appraisal of the property on which loans are made under this section so as to accomplish the purposes of this chapter: *Provided*, That no person shall be allowed to act as appraiser if he is in the employ of any company holding a loan on the property, or if he is interested in the subject matter of the loan.

(i) *Payment of loans in bonds of Corporation.* Any person indebted to the Corporation may make payment to it in part or in full by delivery to it of its bonds which shall be accepted for such purpose at face value.

(j) *Officers and employees; compensation; free use of mails.* The Corporation shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this chapter, without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, or agents of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided by law in the case of the members of the Board. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this chapter and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The Corporation shall pay such proportion of the salary and expenses of the members of the Board and of its officers and employees as the Board may determine to be equitable, and may use the facilities of Federal Home Loan Banks, upon making reasonable compensation therefor as determined by the Board. No person shall be appointed or retained as an officer, employee, agent, or attorney, at a fixed salary, in any regional or State office of the Corporation who is an officer or director of any firm, corporation, or association engaged in lending money on real estate; nor shall any person be appointed or retained as an officer, employee, agent, or attorney in any State or district office of the Corporation, who has not been a bona fide resident of the State served by such office for a period of at least one year immediately preceding the date of his appointment.

(k) *By-laws, rules and regulations; cancellation of bonds; liquidation of Corporation; dividends.* The Board is authorized to make such by-laws, rules and regulations, not inconsistent with the provisions of this section, as may be necessary for the proper conduct of the affairs of the Corporation. The Corporation is further authorized and directed to retire and cancel the bonds and stock of the Corporation as rapidly as the resources of the Corporation will permit. All payments upon principal of loans made by the Corporation shall under regulations made by the Corporation be applied to the retirement of the bonds of the Corporation. Upon the retirement of such stock, the reasonable value thereof as determined by the Board shall be paid into the Treasury of the United States and the receipts issued therefor shall be canceled. The Board shall proceed to liquidate the Corporation when its purposes have been accomplished, and shall pay any surplus or accumulated funds into the Treasury of the United States. The Corporation may declare and pay such dividends to the United States as may be earned and as in the judgment of the Board it is proper for the Corporation to pay.

(l) *When mortgagor must be in default.* No home mortgage or other obligation or lien shall be acquired by the Corporation under subsection (d), and no cash advance shall be made under subsection (f), unless the applicant was in involuntary default on June 13, 1933, with respect to the indebtedness on his real estate and is unable to carry or refund his present mortgage indebtedness: *Provided*, That the foregoing limitation shall not apply in any case in which it is specifically shown to the satisfaction of the Corporation that a default after such date was due to unemployment or to economic conditions or misfortune beyond the control of the applicant.

(m) *Advances for rehabilitation, modernization, etc., of homes.* In all cases where the Corporation is authorized to advance cash to provide for necessary mainten-

ance and to make necessary repairs it is also authorized to advance cash or exchange bonds for the rehabilitation, modernization, rebuilding and enlargement of the homes financed; and in all cases where the Corporation has acquired a home mortgage or other obligation or lien it is authorized to advance cash or exchange bonds to provide for the maintenance, repair, rehabilitation, modernization, rebuilding, and enlargement of the homes financed and to take an additional lien, mortgage, or conveyance to secure such additional advance or to take new home mortgage for the whole indebtedness; but the total amount advanced shall in no case exceed the respective amounts or percentages of value of the real estate as elsewhere provided in this section. Not to exceed $400,000,000 of the proceeds derived from the sale of bonds of the Corporation shall be used in making cash advances to provide for necessary maintenance and necessary repairs and for the rehabilitation, moderinzation, rebuilding and enlargement of real estate securing the home mortgages and other obligations and liens acquired by the Corporation under this section.

(n) *Purchase of obligations of other banks and associations.* The Corporation is authorized to purchase Federal Home Loan Bank bonds, debentures, or notes, or consolidated Federal Home Loan Bank bonds or debentures. The Corporation is also authorized to purchase full-paid-income shares of Federal Savings and Loan Associations after the funds made available to the Secretary of the Treasury for the purchase of such shares have been exhausted. Such purchases of shares shall be on the same terms and conditions as have been heretofore authorized by law for the purchase of such shares by the Secretary of the Treasury: *Provided*, That the total amount of such shares in any one association held by the Secretary of the Treasury and the Corporation shall not exceed the total amount of such shares heretofore authorized to be held by the Secretary of the Treasury in any one association. The Corporation is

also authorized to purchase shares in any institution which is (1) a member of a Federal Home Loan Bank, or (2) whose accounts are insured under sections 1724 to 1730 of this title, if the institution is eligible for insurance under such title; and to make deposits and purchase certificates of deposit and investment certificates in any such institution. Of the total authorized bond issue of the Corporation $300,000,000 shall be available for the purposes of this subsection, without discrimination in favor of Federally chartered associations, and bonds of the Corporation not exceeding such amount may be sold for the purposes of this subsection. (June 13, 1933, c. 64, §4, 48 Stat. 129; April 27, 1934, c. 168, §§1 (a), 2, 3, 4, 13, 48 Stat. 643, 644, 645, 647; June 27, 1934, c. 847, §§506 (a), (b), 508 (b), 48 Stat. 1263, 1264; May 28, 1935, c. 150, §§10-16, 17 (a), 49 Stat. 296-297.)

§1463a. Bonds issued under original provisions; interest and principal.

The amendments made by the Act of April 27, 1934, to subsection (c) of section 1463 of this title (except with respect to refunding) shall not apply to any bonds prior to April 27, 1934, issued by the Home Owners' Loan Corporation under such subsection (c) of section 1463, or to any bonds thereafter issued in compliance with commitments of the Corporation outstanding on April 27, 1934. (April 27, 1934, c. 168, §1, (b), 48 Stat. 644.)

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 10.

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY,
Petitioner.

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR PETITIONER.

WILLIAM C. WALSH,
Attorney General of the State of Maryland,

WILLIAM L. HENDERSON,
Deputy Attorney General,

H. VERNON ENEY,
Asst. Attorney General,

Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 10.

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY,

Petitioner.

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion and decision of the Court of Appeals of the State of Maryland has not yet been officially reported but it is printed in the record (R. 19-23) and is unofficially reported in 2 Atl. (2d) 689. The opinion of the Baltimore City Court (the *nisi prius* court) is not reported but is printed in the record (R. 9-17).

JURISDICTION.

The order of the Court of Appeals of the State of Maryland (the highest court of the State), which affirmed the order of the Baltimore City Court, was entered on December 1, 1938. On petition, the mandate was stayed pending an application to this Court for a writ of certiorari. The petition for a writ of certiorari was filed on February 25, 1939, and was granted on April 17, 1939. The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 937; 28 U. S. C., Section 344.

The jurisdiction of this Court is invoked on the ground that the Court below held the Maryland statute imposing a recordation tax invalid to the extent that it taxed the recordation of mortgages of the Home Owners' Loan Corporation, and in so doing held that the Home Owners' Loan Corporation is, under the Constitution and laws of the United States, immune from taxation on the recordation of its mortgages; that it is an instrumentality of the Federal government and, as such, is subject only to such State taxation as the statute authorizing its creation permits; and that the imposition of the tax in this case has been prohibited by the Act of Congress authorizing the creation of the Home Owners' Loan Corporation. The decision of the Court below was based solely upon the decision of this Court in *Federal Land Bank vs. Crosland*, 261 U. S. 374, where it was held that a mortgage to the Federal Land Bank was not subject to a recordation tax imposed by an Alabama statute.

The petitioner is an elected officer of the State of Maryland, but this Court has the right, on his applica-

tion, to review, on certiorari, a decision of the Court of Appeals of Maryland declaring a Maryland statute repugnant to the Constitution and laws of the United States.[1]

STATEMENT OF THE CASE AND QUESTION PRESENTED.

By a final order and judgment, the Court of Appeals of Maryland affirmed a final order of the Baltimore City Court directing that a writ of mandamus be issued by the Clerk of the Baltimore City Court commanding the petitioner, as Clerk of the Superior Court of Baltimore City, to receive and record a certain mortgage from Martin J. Burns and Mary Burns, his wife, to the Home Owners' Loan Corporation, dated March 11, 1938, upon the payment of the ordinary statutory recordation charge and "without the requirement of the affixation of the State of Maryland Documentary Stamps nor the State recordation tax of fifty cents" (R. 17).

The question presented is whether, under the Constitution of the United States and the Home Owners' Loan Act of 1933, the Maryland statute which imposes a uniform, non-discriminatory recordation tax on, and requires State of Maryland Documentary Stamps to be affixed to all mortgages, other than purchase money mortgages, offered for record and recorded in the State of Maryland, is invalid to the extent that it requires the payment of such tax and the affixation of such documentary stamps upon the recordation of mortgages on Maryland real estate from residents of Maryland to the Home Owners' Loan Corporation.

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[1] Coleman v. Miller, 307 U. S. , 83 L. Ed. 947 (Adv. Sheets).

SPECIFICATION OF ERRORS.

The Court of Appeals of Maryland erred:

1. In holding that the decision of this Court in *Federal Land Bank vs. Crosland*, 261 U. S. 374, was necessarily controlling.

2. In failing to hold that the burden of the tax on the Home Owners' Loan Corporation as an instrumentality of the United States was speculative, remote and uncertain, if, indeed, it existed at all, in view of the fact that the tax could be, and customarily is, paid by the mortgagor.

3. In holding that the recordation of a mortgage on Maryland real estate from a citizen of the State of Maryland to the Home Owners' Loan Corporation was immune from taxation by the State of Maryland.

4. In failing to hold that the recordation of such a mortgage was not immune from the tax in view of the fact that the tax was uniform, operated upon all persons and corporations offering mortgages for record, and did not discriminate against the Home Owners' Loan Corporation or the United States.

STATUTES INVOLVED.

The pertinent statutory provisions are Sections 213 and 214 of Article 81 of the Code of Public General Laws of Maryland (as enacted by Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland of 1937) and the Home Owners' Loan Act of 1933, approved June 13, 1933, Chapter 64; 48 Stat. 128; 12 U. S. C., Sections 1461-1463a.

The Maryland statute is set out in full in the appendix, *infra*, pp. 53-54. The statute imposes a tax "upon

every instrument of writing recorded or offered for record * * * including mechanics' liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property". Assignments of mortgages, purchase money mortgages, absolute or partial releases, and orders of satisfaction are exempt from the tax. The tax is fifty cents, plus ten cents for each one hundred dollars, or fractional part thereof, of the consideration in the case of instruments conveying title, or of the principal amount of the debt in the case of instruments securing a debt, or reserving title as security for a debt.[2]

It is conceded that this statute imposes a tax and not merely a service charge for recording. Likewise, it must be conceded by the respondent that the tax is uniform, that it operates upon all persons and corporations offering mortgages and other instruments of writing for record, and that it does not discriminate against the Home Owners' Loan Corporation or the United States. No question as to the construction or meaning of the statute is involved in this case, it being admitted that by its terms the statute purports to tax the recordation of a mortgage of the Home Owners' Loan Corporation. However, the statute does not impose a tax upon the Home Owners' Loan Corporation or in any way desig-

[2] The tax imposed by Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland of 1937 by its terms would expire on September 30, 1939, but the tax, with certain modifications not here important, has been continued by Section 6 of Chapter 277 of the Acts of the General Assembly of Maryland of 1939.

nate the person by whom the tax is to be paid. In the case of deeds and other instruments conveying title, the tax is customarily divided between the parties; in the case of mortgages, the tax is customarily paid by the mortgagor. Although this question has never been presented to or decided by the Court of Appeals of Maryland, it is obvious from a reading of the statute and is confirmed by the fact that the Attorney General of Maryland, who is by law the legal adviser of the Clerks of the Courts who collect the tax, has formally advised such Clerks that parties, as between themselves, may make any arrangement they choose for the payment of the tax. A copy of the formal opinion of the Attorney General of Maryland is set out in the appendix, *infra*, p. 67.

The Home Owners' Loan Act of 1933 is set out in full in the appendix, *infra*, pp. 55-56.

The respondent, Home Owners' Loan Corporation, was organized by resolution of the Federal Home Loan Bank Board, pursuant to Section 1463a of the Home Owners' Loan Act of 1933, which provides as follows:

> "The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation."

We are here particularly concerned only with that part of Section 1463(c) of the Act which reads as follows:

> "The bonds issued by the corporation under this sub-section shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

STATEMENT.

The petitioner is the Clerk of the Superior Court of Baltimore City (a court of record of the State of Maryland) and as such, under the laws of Maryland, has charge of the recording of all deeds, mortgages and other like instruments conveying real estate located in Baltimore City (R. 2). A duly executed mortgage to the Home Owners' Loan Corporation on real estate in Baltimore City was presented to the petitioner with the request that the same be recorded among the Land Records of Baltimore City. The correct amount of the statutory recordation charge was tendered but since there were no State of Maryland Documentary Stamps affixed to the mortgage and since the Home Owners' Loan Corporation refused to pay the recordation tax of fifty cents the petitioner refused to accept the mortgage for record (R. 2-3).

Under the Maryland law the recording of the mortgage was necessary for the adequate protection of the

mortgagee (R. 2) and upon the refusal of the petitioner to record the mortgage without the stamps being affixed thereto and without the payment of the special recordation tax of fifty cents, the Home Owners' Loan Corporation filed a petition for a writ of mandamus in the Baltimore City Court (R. 1-8). The petition was demurred to (R. 8), and, the demurrer being overruled (R. 9), the petitioner herein declined to answer. The Baltimore City Court then passed an order directing the Clerk thereof to issue the writ of mandamus (R. 17-18). It is conceded that the facts stated in the petition (but not the conclusions of law) are true.

The petition alleges that the Home Owners' Loan Corporation is a corporate instrumentality of the United States organized, existing and operating pursuant to the Home Owners' Loan Act of 1933 (12 U. S. C. Secs. 1461 to 1463a, inclusive) whose entire capital stock is owned by the United States (R. 1). The Home Owners' Loan Corporation has been operating in Maryland as well as in other States and in the course of its operations made a loan of $111.00, payable one day after date, with interest at 5% per annum, to Martin J. Burns and Mary Burns upon the security of a mortgage on certain leasehold property in Baltimore City (R. 1-2). The mortgage was promptly tendered to the petitioner herein, as the Clerk of the Superior Court of Baltimore City, for record but he refused to record the same unless the tax prescribed by Sections 213 and 214 of Article 81 of the Code of Public General Laws of Maryland was paid in addition to the usual recordation charge which was tendered to him (R. 2-3). The petition further alleges that the stamp and recording tax imposed by said Sections 213 and 214 of the Maryland Code is an excise tax and

not a service charge; that the Home Owners' Loan Corporation, by reason of the Home Owners' Loan Act of 1933 and the fact that it is an instrumentality of the United States, is immune and exempt from State taxation on its mortgages; and that the attempted collection of the tax on the recordation of its mortgages is an unlawful interference with its operations, placing a burden, impediment and obstruction upon its functions, and operating to hinder, delay and embarrass it in the exercise of the duties imposed upon it by law (R. 3-4).

As illustrative of the scope of the corporation's operations, the petition alleges that about $46,000,000 have been loaned on mortgages in Maryland since operations were begun and that the corporation has acquired title to about 2,000 separate pieces of property in Maryland (R. 4).

SUMMARY OF ARGUMENT.

At its regular session in 1937 the Legislature of Maryland passed an Act[3] imposing certain taxes to raise money for state relief purposes. The Governor of the State vetoed the bill and immediately called a special session of the Legislature to consider the urgent problem of relief in Maryland and to provide some means of raising sufficient revenue to enable the State to match Federal appropriations under the Social Security Act and to furnish such additional direct relief as was absolutely essential to furnish aid to the needy. At the special session held in April and May, 1937, the Legislature considered relief problems almost exclusively. Maryland is a small State; its tax resources are not unlimited and the problem of raising sufficient revenue for mini-

[3] Chapter 382 of the Acts of 1937.

mum relief purposes was and is a serious one. Because of local conditions many forms of taxation availed of by other States are not practicable in Maryland. It was thought not possible to raise sufficient revenue by an increase in property taxes which were already heavy. Resort had to be made to special excise or privilege taxes.

As finally enacted, Chapter 11 of the Acts of the Special Session of 1937, imposed five new excise and license taxes, including an income tax, increased one existing excise tax and continued three existing excise and license taxes. By the terms of the Act the entire revenue from these excise taxes and license fees is required to be deposited in a "State Fund for Aid to the Needy" and is disbursed therefrom only for relief purposes and for the purpose of matching Federal appropriations under the Social Security Act.

The recordation tax on deeds, mortgages and other instruments offered for record was one of the new excise taxes imposed by Chapter 11 of the Acts of the Special Session of 1937.[1] In imposing the tax the statute is not discriminatory; it applies to all alike; and it does not contain any exemptions or exceptions. If, as held by the Court below, an exemption must be written into the Act by the overriding force of the Federal Constitution in favor of the Home Owners' Loan Corporation then a

[1] It was estimated that the total revenue from all nine excise taxes and license fees for a two year period would be $7,000,000. Of this total $470,000 was expected to be realized from the recordation tax. Prior to the regular session of the Legislature in 1939 a Commission of experts appointed by the Governor exhaustively studied the problem of raising sufficient revenue. They recommended the continuance of most of the excises imposed by the 1937 Act, including the recordation tax. Of the total of $16,560,000 which they estimated would be realized from these special excises in a two year period, $470,000 was estimated as the probable revenue from the recordation tax.

similar exemption must exist as to each of the other numerous lending agencies of the Federal Government. If the claimed immunity is confirmed in this case, then we may expect a similar claim to immunity to be made by the Reconstruction Finance Corporation, the Federal Land Banks, the National Banks, the State Banks which are members of the Federal Reserve System, the Farm and Crop lending agencies, the Federal Housing Administration, the Federal Savings and Loan Corporations and the many other Federal lending agencies too numerous to mention.[5] If so, this legitimate and much needed source of State taxation would be substantially impaired, because it is common knowledge that a very large percentage of mortgage loans made in recent years have emanated from these lending agencies. Moreover, if these Federal agencies are to be exempted from the tax, then the State of Maryland, in fairness to the private agencies engaged in similar activities, would probably have to abandon the tax. If this were not done the continuation of the tax would constitute a clear discrimination against these private agencies, such as State Banks, Insurance Companies, Mortgage Companies, Building and Loan Associations and other similar private lending

[5] In the brief filed for the United States, as intervenor, in *Loomis vs. First Federal Savings and Loan Association*, No. 277, October Term, 1938, (dismissed on motion of the petitioners) it is stated that there are "38 separate agencies of the United States engaged in credit operations of one form or another; * * * 15 have their funds contributed entirely by the United States or another of its agencies, 19 have both public and private investment by subscription or loans, and 4 have no public funds invested in them. * * * The federal credit agencies number over 15,000 separate corporations or organizations. Their total assets, excluding the investments of one federal agency in another, are about $44,000,000,000". About $30,000,000,000 of this total is represented by assets of national banks. These various agencies are listed and classified at pages 11-15 of the government's brief. How many of these organizations are operating in the State of Maryland, or to what extent any of them would be affected by the recordation tax, we do not know.

agencies operating in the same field. The question presented is, therefore, one of the utmost importance to the State of Maryland and one that vitally affects a substantial source of revenue.

The primary purpose of the Home Owners' Loan Corporation is to assist home owners who, because of unfortunate circumstances, are in default on mortgages on their homes. The purpose of the Maryland recordation tax is to raise revenue with which the State may give aid to an even more necessitous group of persons, most of whom have no homes to mortgage, who, by reason of tender years, blindness, sickness, unemployment, old age or other disability, are incapable of self-support. It would produce a bitter paradox if it were held that the tax levied by the State to raise revenue for these purposes was unconstitutional because it might indirectly increase the interest charges of a less necessitous class of Maryland citizens.

We do not think it is necessary to reach any such result. It seems to us clear that the Maryland tax may be sustained without in anyway interfering with the Federal function. We are not contending that the Home Owners' Loan Corporation is not a governmental agency and instrumentality.[5] But we do most earnestly contend that there is no immunity from the Maryland recordation tax on mortgages to the Home Owners' Loan Corporation because:

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[5] In *Kay vs. U. S.*, 303 U. S. 1, and in *Graves vs. New York ex rel O'Keefe*, ... U. S. ...., 83 L. Ed. 577, the Court assumed that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the Federal government. For the purposes of this case we make the same assumption. We also assume that the Home Owners' Loan Corporation was validly created by a mere resolution of the Federal Home Loan Bank Board.

1. The tax is uniform and does not discriminate against the Home Owners' Loan Corporation or the United States.

2. The tax is not a burden on the Home Owners' Loan Corporation since it could be, and customarily is, paid by the mortgagor.

3. If the tax is paid by the mortgagor, the effect on the Home Owners' Loan Corporation of collecting the tax from the mortgagor, and the slight increase in the cost of its operations which this might entail, is so speculative, remote and uncertain as to constitute no burden at all in the constitutional sense.

4. Even if the tax were required to be paid by the Home Owners' Loan Corporation, it would not be immune from the tax because the activities carried on by the Home Owners' Loan Corporation are such that a nondiscriminatory tax of this character laid upon it, as well as upon private agencies operating in the money lending field, would not retard, impede or obstruct the operations of the Home Owners' Loan Corporation.

5. The Home Owners' Loan Act of 1933 does not confer upon the Home Owners' Loan Corporation an immunity from the Maryland recordation tax.

6. If the Home Owners' Loan Act of 1933 must be construed to confer upon the Home Owners' Loan Corporation an immunity from the Maryland recordation tax then the Act is, to that extent, unconstitutional and void because the Congress has no power to confer upon agencies of the Federal government an immunity from State taxation which is broader and more extensive than the implied constitutional immunity.

The doctrine of the implied immunity of a Federal governmental agency from burdensome taxation by a State, and of the similar immunity of State governmental agencies from burdensome taxation by the Federal government first appeared in the decision of Chief Justice MARSHALL in *M'Culloch vs. Maryland*, 4 Wheat. 316. Since then this Court has had to deal with many varied aspects of the problem in numerous cases. No good purpose would be served by reviewing all of these cases, or even the greater part of them. An exhaustive review of the principal cases was recently before this Court[7] and many of the earlier cases, and even some of the fairly recent cases, have been overruled.[8] We will therefore confine our discussion to the cases decided in the past few years and a few of the earlier cases in which the decisions were based upon principles still regarded as sound.

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[7] See brief of the Solicitor General as amicus curiae in *Graves vs. New York ex rel O'Keefe*, ... U. S. ...., 83 L. Ed. 577.

[8] *Helvering vs. Mountain Producers Corp.*, 303 U. S. 376, overruling *Gillespie vs. Oklahoma*, 257 U. S. 501 and *Burnet vs. Coronado Oil and Gas Co.*, 285 U. S. 393; *James vs. Dravo Contracting Co.*, 302 U. S. 134, limiting *Panhandle Oil Co. vs. Mississippi*, 277 U. S. 218, *Indian Motorcycle Co. vs. United States*, 283 U. S. 570, and *Graves vs. Texas Company*, 298 U. S. 393, and distinguishing many other cases and which Mr. Justice Roberts said, in dissenting, "overruled, sub silentio, a century of precedents"; *Helvering vs. Gerhardt*, 304 U. S. 405, overruling *Brush vs. Commissioner*, 300 U. S. 352, and of which Mr. Justice Butler, in dissenting, said "expressly or sub silentio, it overrules a century of precedents; and *Graves vs. New York ex rel O'Keefe*, ... U. S. ...., 83 L. Ed. 577, overruling *Collector vs. Day*, 11 Wall. 113, *New York ex rel. Rogers vs. Graves*, 299 U. S. 401, and *Dobbin vs. Commissioners of Erie County*, 16 Pet. 435.

ARGUMENT.

I.

FEDERAL LAND BANK VS. CROSLAND IS NO LONGER A BINDING AUTHORITY.

The decision of the lower Court is based squarely and solely upon the decision of this Court in *Federal Land Bank vs. Crosland*, 261 U. S. 374, where an Alabama recordation tax was held invalid as applied to a mortgage to the Federal Land Bank of New Orleans. It is possible to argue that the *Crosland* case may be distinguished from the case at bar on several grounds. The Alabama statute there involved imposed the tax on the lender whereas the Maryland tax is imposed on the privilege of recording an instrument and the statute is silent as to who shall pay the tax. It is, of course, customarily paid by the borrower, and it is within the power of the lender in every case to avoid payment of the tax by requiring its payment by the borrower. It is true that in the *Crosland* case the contention was made that the tax there under consideration might be collected by the lender from the borrower and this Court in its opinion stated that this made no difference. But the fact remains that the Alabama tax was a tax required to be paid by the lender who was also required to file a certificate that the tax was paid by him. Neither of these things is required by the Maryland statute. Likewise the decision in the *Crosland* case depended upon the provision of the Federal Farm Loan Act which declared the mortgages of Federal Land Banks to be instrumentalities of the government of the United States and, as such, exempt from Federal, State, municipal and local taxation. There is no such provision in the Home Owners' Loan Act of 1933. The Home Owners' Loan Corporation is

declared to be an instrumentality of the United States but its mortgages are not declared to be such instrumentalities, although its "loans and income" are declared to be exempt from taxation.

However, we do not think these distinctions should be controlling on the question of the tax immunity of the Home Owners' Loan Corporation and, as we pointed out in our brief in support of our petition for a writ of certiorari, we rest our argument on broader considerations. In that brief we said that we were willing to concede that if the *Crosland* case is still to be considered as a binding precedent in spite of the recent decisions of this Court,* then the decision of the Court below was correct. The Solicitor General concluded his brief in opposition by saying that "unless the court wishes to re-examine *Federal Land Bank vs. Crosland, supra*, the petition should be denied". This Court granted certiorari and we therefore conclude that the Court does wish to re-examine and re-consider the decision in the *Crosland* case in the light of the more recent decisions of the Court and particularly the decision in *Graves vs. New York, ex rel. O'Keefe*, — U. S. —, 83 L. Ed. 577, decided while the petition for a writ of certiorari in the case at bar was pending. In our argument we are therefore assuming that the decision in the *Crosland* case is not in itself a binding precedent and that its authority depends entirely upon the force of its reasoning. We contend that the *Crosland* case was erroneously decided, that it

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* *James vs. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason Co. vs. State Tax Commission of Washington*, 302 U. S. 186; *Atkinson vs. State Tax Commission of Oregon*, 303 U. S. 20; *Helvering vs. Mountain Producers Corporation*, 303 U. S. 376; *Helvering vs. Gerhardt*, 304 U. S. 405; and *Allen vs. Regents of University System of Georgia*, 304 U. S. 439, were referred to and since then *Graves vs. New York ex rel. O'Keefe* .... U. S. ....., 83 L. Ed. 577, has been decided.

is out of harmony with correct principle and that it should be overruled.[10]

Apparently the question in the case at bar was not clearly presented to the Court in the *Crosland* case. It was assumed, if not conceded, that if the Alabama statute imposed a tax on the Federal Land Bank it was invalid. The entire argument for the State of Alabama seems to have been that the charge was not a tax which the Federal Land Bank was required to pay in any event, but was merely a charge which it was obliged to pay if it wished to avail itself of the Alabama system of recording deeds and mortgages. There was no consideration of the question of whether the tax was discriminatory or of whether it imposed a direct burden on the Federal Land Bank. The Court quoted the Federal statute exempting the Federal Land Bank mortgages from tax and said: "The validity of this provision is not questioned. * * * Of course, therefore, it must prevail over any inconsistent laws of a state." This is the only part of the opinion which in any way bears on the question of the implied constitutional immunity of a Federal agency from taxation by a State.

The only authority cited by the Court in that connection was *Smith vs. Kansas City Title and Trust Co.*, 255 U. S. 180, and that case is certainly no authority, one way or the other, on the question presented by the case at bar. There the principal question under consideration was the constitutionality of the Federal Farm Loan Act of 1916. In upholding the constitutionality of that

[10] In two other cases state courts have held mortgages of the Federal Land Banks and the Home Owners' Loan Corporation exempt from state recordation taxes, but both of these cases were decided upon the authority of the *Crosland* case. See *Home Owners' Loan Corporation vs. Anderson*, 145 Kan. 209, 64 Pac. (2d) 14, and *Federal Land Bank vs. Hubbard*, 163 Va. 860, 178 S. E. 16.

Act the Court, on the authority of *M'Culloch vs. Maryland*, 4 Wheat. 316, held that the Congress had some power to grant an exemption from State tax to its governmental agencies but neither the extent of the power nor the extent of the exemption from taxation was considered or discussed.

We therefore respectfully submit that the question in the case at bar should be considered as an open one, not governed by the *Crosland* case, but to be determined in accordance with the basic principles applied in the recent decisions of this Court.

II.

THE TAX IS UNIFORM AND NOT DISCRIMINATORY AND THEREFORE NOT PROHIBITED.

As early as *M'Culloch vs. Maryland*, 4 Wheat. 316, it was recognized that the question of whether or not a State tax discriminated against a Federal agency was of vital importance in determining whether there was an implied constitutional immunity from the tax. It will be remembered that the tax there involved was clearly a discriminatory tax levied by the State of Maryland against the Bank of the United States. Although the tax was levied against "all banks, or branches thereof, in the State of Maryland, not chartered by the legislature", it was obviously directed against the Bank of the United States and designed to hamper and impede its operations. It is significant that in holding that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government", Chief Justice MARSHALL took occasion to say:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not

extend to a tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state." (4 Wheat. 436.)

In other words, a tax on the operations of the bank which would retard, impede or burden it in the discharge of its governmental functions was unconstitutional and void; but a non-discriminatory tax on the property of the bank, which could not have this effect, was constitutional, and valid.[11] It might well be argued that a non-discriminatory tax could never be burdensome in the constitutional sense and hence that there could be no constitutional immunity from a non-discriminatory tax. However, it is not necessary for us to go so far in this case and candor compels us to admit that in no case has it flatly been said that a non-discriminatory tax is, in all instances, valid and in some cases the question of whether or not the tax was discriminatory has been lost sight of.[12]

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[11] In two other early cases much relied upon in subsequent cases, the challenged tax was clearly discriminatory. See *Osborn vs. United States Bank*, 9 Wheat. 738, and *Weston vs. City Council of Charleston*, 2 Pet. 449.

[12] So far as we know the Supreme Court in only a few cases has expressly rejected the argument that a non-discriminatory tax is valid. In *New York ex rel. Bank of Commerce vs. Commissioners of Taxes*, 2 Black 620 and *New York ex rel. Bank of the Commonwealth vs. Commissioners of Taxes*, 2 Black 635, decided the same day, the Court held a non-discriminatory New York tax on the capital stock of New York banks invalid to the extent that Federal securities owned by the bank were included in computing the valuation of the capital stock subject to the tax. In *Johnson vs. Maryland*, 254 U. S. 51, 55, dealing with the right of the State of Maryland to require a Post Office employee to obtain a chauffeur's license Mr. Justice Holmes said: "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has geen regarded as established since *M'Culloch vs. Maryland*, 4 Wheat. 316". But compare *Schuylkill Trust Co. vs. Pennsylvania*, 302 U. S. 506 and *Schuylkill Trust Co. vs. Pennsylvania*, 296 U. S. 113, where it was held that a State tax upon corporate shares, as distinguished from a tax upon the assets constituting the value of the shares, was not invalid even though Federal securities were included in determining the value of the corporate shares.

Nevertheless, in almost all of the more recent cases involving this question the non-discriminatory feature of the tax has been referred to,[13] and in many of the cases it has been stressed as a factor of major importance.[14] The fact that a challenged tax was not discriminatory has also been relied upon by dissenting Justices.[15]

In his dissenting opinion in *Brush vs. Commissioner of Internal Revenue*, 300 U. S. 352, 375, Mr. Justice ROBERTS apparently gives equal weight to the question of whether or not the challenged tax is discriminatory and the question of whether or not the challenged tax constitutes a burden upon the governmental agency. He said:

> "It seems to me that the reciprocal rights and immunities of the national and a state government may be safeguarded by the observance of two limitations upon their respective powers of taxation. These are that the exactions of the one must not discriminate against the means and instrumentalities of the other and must not directly burden the operations of that other. To state these canons otherwise: an exaction by either government which hits the means or instrumentalities of the other infringes the principle of immunity if it discriminates against them and in favor of private citizens or if the burden of the tax be palpable and direct rather than hypothetic and remote."

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[13] See *Denman vs. Slayton*, 282 U. S. 514; *Group No. 1 Oil Corp. vs. Bass*, 283 U. S. 279; *Educational Films Corp. vs. Ward*, 282 U. S. 379, *Fox Films Corp. vs. Doyal*, 286 U. S. 123; *Indian Territory Illuminating Oil Co. vs. Board of Equalization*, 288 U. S. 325; *Burnet vs. A. T. Jergins Trust*, 288 U. S. 508; *Federal Compress Co. vs. McLean*, 291 U. S. 17; *James vs. Dravo Contracting Co.*, 302 U. S. 134.

[14] See *Metcalf and Eddy vs. Mitchell*, 269 U. S. 514; *Willcuts vs. Bunn*, 282 U. S. 216; *Pacific Co. vs. Johnson*, 285 U. S. 480; *Taber vs. Indian Territory Illuminating Oil Co.*, 300 U. S. 1; *Helvering vs. Mountain Producers Corp.*, 303 U. S. 376; *Helvering vs. Gerhardt*, 304 U. S. 405; *Graves vs. New York, ex rel. O'Keefe*, ... U. S. ...., 83 L. Ed. 577.

[15] See *Long vs. Rockwood*, 277 U. S. 142; *National Life Insurance Co. vs. United States*, 277 U. S. 508; *Macallen Co. vs. Mass.*, 279 U. S. 620.

Entirely apart from the force of its own reasoning, the dissenting opinion of Mr. Justice ROBERTS in the *Brush* case now has even more significance in view of the fact that the Supreme Court in later decisions first limited,[16] then expressly overruled,[17] the majority opinion in the *Brush* case. It is not necessary for us in the case at bar to establish the proposition that the fact that a tax is uniform and not discriminatory is the sole factor to be considered in determining whether or not there is any constitutional immunity from such a tax. Certain it is that the question of discrimination or lack of discrimination is strongly relied upon in the decision as to whether or not there is a constitutional immunity.

It may be that the presence or absence in a challenged tax of discrimination against a Federal agency is not so much in itself a test of whether or not there is a constitutional immunity from the tax as it is a major factor in determining whether the tax constitutes a direct and substantial burden on the Federal agency and operates to obstruct or impede its activities. This Court has often said that the constitutional immunity of either a Federal or State agency from taxation by the other sovereignty should not be extended beyond the necessities of the case and that the taxing power of the one should not be limited unless it was essential in order to avoid undue interference with the agency of the other sovereignty. If it be conceded that the grant of immunity should not be permitted to extend beyond the necessities of the case, then it becomes apparent that neither the States nor the Federal government, under the guise of a grant of immunity from taxation, should be required to confer

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[16] *Helvering vs. Gerhardt*, 304 U. S. 405.

[17] *Graves vs. New York ex rel. O'Keefe*, ... U. S. ...., 83 L. Ed. 577.

a bounty upon the other or give it a benefit not enjoyed by private persons carrying on similar operations. This was pointed out by this Court as recently as *Helvering vs. Gerhardt*, 304 U. S. 405, where this Court said:

> "The basis upon which constitutional tax immunity of a State has been supported is the protection which it affords to the continued existence of the State. To attain that end it is not ordinarily necessary to confer on the State a competitive advantage over private persons in carrying on the operations of its government". (304 U. S. 421.)

It might be said that a discriminatory tax against a federal agency in and of itself, and solely by reason of the fact that it is discriminatory, imposes an unconstitutional burden on the Federal agency, but that a non-discriminatory tax is prima facie valid and the burden is then upon him who claims a constitutional immunity to show that, notwithstanding the tax is not discriminatory, it nevertheless imposes a direct and substantial burden on the operations of the governmental agency. In other words, the absence of discrimination perhaps does not in itself require the rejection of an asserted claim for immunity but it is a factor of primary importance in determining whether or not the tax is burdensome.

The Maryland tax under consideration is uniform and clearly not discriminatory. It is required to be paid by every person offering for record and recording a mortgage, deed and many other instruments of writing. The tax applies not only to private persons, it applies as well to instrumentalities of the State of Maryland. The tax is required to be paid upon the recording of a deed from a County Tax Collector to the County Commis-

sioners[18], the recording of a deed to a municipality of the State of Maryland[19], and the recording of a deed to the State Roads Commission, an agency of the State of Maryland.[20] Under no circumstances can the Maryland tax be said to be discriminatory and while we do not contend that this is conclusive in the case at bar, we do most strongly urge that it is a factor of major importance and requires the government to establish clearly that, notwithstanding the lack of discrimination, the tax is a burden on its operations.

III.

THE TAX IS NOT A BURDEN ON THE HOME OWNERS' LOAN CORPORATION.

A.

The Rule Announced in the Earlier Cases.

It is difficult, if not impossible, from an examination of the numerous decisions on the question to state with any certainty a rule by which it could be determined whether a tax sought to be imposed upon a governmental agency is so direct and burdensome as to be invalid. And in view of the recent restatements of the correct principle, no useful purpose would be served in making an exhaustive review of these numerous cases. Never-

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[18] So ruled by the Attorney General of Maryland in an opinion dated July 14, 1937, to the Clerk of the Circuit Court for Allegany County reported in Volume 22 of the Report and Official Opinions of the Attorney General of Maryland at page 722. Upon like reasoning the Attorney General ruled that a mortgage to the Federal Reserve Bank of Richmond was not exempt from the tax. 22 Report and Official Opinions of the Attorney General, page 602.

[19] So held by Chief Judge Dennis of the Supreme Bench of Baltimore City in an opinion on July 16, 1937 filed in the Baltimore City Court in the case of *Mayor and City Council of Baltimore vs. Little, Clerk of the Superior Court of Baltimore City.* This opinion is not officially reported but was printed in the Daily Record, a legal publication in Baltimore City, on July 20, 1937. The case was not appealed.

[20] See 22 Report and Opinions of the Attorney General of Maryland, page 600.

theless, a few of the earlier cases stated with such clarity the basis for the immunity, we think it would probably be helpful to refer to them.

All discussion of this problem must necessarily begin with the decision of Chief Justice MARSHALL in *M'Culloch vs. Maryland*, 4 Wheat. 316. That case has been discussed so frequently that it is not necessary to review it in any detail. But several of the statements made by the Chief Justice in the course of his opinion are well worth repeating. At the very outset of his discussion of the question, he said:

> "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied." (4 Wheat. 425).

And in summing up his opinion he said:

> "The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." (4 Wheat. 436.)

In *Union Pacific Railroad vs. Peniston*, 18 Wall. 5, 30, Mr. Justice STRONG said:

> "But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General Government, or interfere with its

operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The States are, and they must ever be, co-existent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

In *Metcalf and Eddy vs. Mitchell*, 269 U. S. 514, 523-524, Mr. Justice STONE said:

"In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of Federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the Federal government affects in some measure the cost of operation of the other.

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence, the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax

> * * * or the appropriate exercise of the functions of the government affected by it. * * *
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> "While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power."

In *Willcuts vs. Bunn*, 282 U. S. 216, 225, Chief Justice HUGHES said:

> "The limitation of this principle to its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government."

In *Educational Films Corp. vs. Ward*, 282 U. S. 379, 391-392, Mr. Justice STONE again said:

> "This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumen-

talities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other."

And in *Fox Film Corp. vs. Doyal*, 286 U. S. 123, 128, Mr. Chief Justice HUGHES said:

"Where the immunity exists, it is absolute, resting upon an 'entire absence of power' * * * but it does not exist where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government' * * *".

And again in *Indian Territory Illuminating Oil Co. vs. Board of Equalization*, 288 U. S. 325, 327-328, Mr. Chief Justice HUGHES said:

"There is a recognized distinction between a non-discriminatory tax upon the property of an agent of government, albeit the property is used in, or has relation to, the business of the agency—where there is only a remote, if any, influence upon the exercise of the functions of government—and a tax which is deemed to impose a direct burden upon the exertion of governmental powers".

And Mr. Justice CARDOZO, dissenting in *Schuylkill Trust Co. v. Pa.*, 296 U. S. 113, 127, said:

"A sterile formalism would quickly lead to an impasse, and the activities of the states checked because of an indirect effect upon the agencies of the

federal government, and the federal activities checked for fear of a like effect upon the agencies of the states. One must view the subject in a large way if government is to go on at all."

In the fairly recent case of *United States v. California*, 297 U. S. 175, dealing with the question of whether or not a State owned railroad was subject to the Federal Safety Appliance Act, Mr. Justice STONE said:

"The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, * * * which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it."

It will be noted that in all of these cases the Court has clearly recognized the necessity of avoiding an extension of the immunity from tax for fear of crippling the taxing power of either the States or the Federal government. The immunity exists only to the extent necessary to prevent undue interference with the operations of the States by the Federal government, or undue interference by the States with the operations of the Federal government. The Court has clearly established the rule that no tax burdens the operations of the governmental instrumentality unless the tax has a direct and immediate affect upon the operations of the governmental instrumentality and operates to restrict, retard, impede or

obstruct its activities. It is not sufficient that the tax merely increases the cost of carrying on the governmental activity.[21] To constitute a burden so as to be within the implied constitutional prohibition, the tax must have the effect, in some degree, of preventing the governmental agency from carrying on its activities. It is not easy to draw the line between what constitutes a burden and what does not and almost all of the cases on the question have turned upon the question of whether, under the particular facts of the case, the tax was a burden so direct and substantial that it clearly interfered with the functions of the governmental agency.

During the past two terms the Court, while adhering to the same principle that the tax must constitute a direct and substantial burden to be invalid, has, nevertheless, indicated that a different concept of what constitutes a burden now prevails. In so doing, the Court has upheld taxes which heretofore had been thought to constitute a burden and has overruled many decisions holding such taxes invalid on the ground that they constituted an unlawful burden. The Court has therefore indicated a tendency to enlarge rather than restrict the power to tax and to confine within much narrower limits the implied constitutional immunity from taxation enjoyed by governmental agencies. The decision of the case at bar therefore turns, we think, on the cases decided within the past two years rather than upon the numerous earlier decisions of this Court.

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[21] See *Metcalf and Eddy vs. Mitchell*, 269 U. S. 514; *Group No. 1, Oil Corp. vs. Bass*, 283 U. S. 279; *Burnet vs. A. T. Jergins Trust*, 288 U. S. 508; *James vs. Dravo Contracting Co.*, 302 U. S. 134; *Helvering vs. Mountain Producers Corp.*, 303 U. S. 376; *Helvering vs. Gerhardt*, 304 U. S. 405; and *Graves vs. New York ex rel. O'Keefe*, ... U. S. ...., 83 L. Ed. 577.

B.

The Recent Decisions of This Court.

We rely most strongly upon the decisions of this Court in *James vs. Dravo Contracting Co.*, 302 U. S. 134; *Silas Mason Co. vs. State Tax Commission of Washington*, 302 U. S. 186; *Atkinson vs. State Tax Commission of Oregon*, 303 U. S. 20; *Helvering vs. Mountain Producers Corp.*, 303 U. S. 376; *Helvering vs. Gerhardt*, 304 U. S. 405; *Allen vs. Regents of University System of Georgia*, 304 U. S. 439; and *Graves vs. New York ex rel O'Keefe*, U. S. , 83 L. Ed. 577, to sustain our contention that the Home Owners' Loan Corporation has no immunity from the Maryland recordation tax. All of these cases were decided within the past two years and in each of them this Court has found that the challenged tax did not impose such a direct, substantial burden as to bring it within the constitutional prohibition. From a reading of these cases it is clear that the Court has suggested a different approach to the problem and that the present tendency is to scrutinize carefully any claim to immunity and allow it only when it is abundantly clear that to disallow the claim to immunity would be to impose an unreasonable burden on a governmental agency. This is particularly true where the immunity, if allowed, would result in a benefit to a private person, but where the burden, if any, on the governmental agency was remote, speculative and uncertain. It is our contention that this situation exists in the case at bar and that the burden, if any, upon the Home Owners' Loan Corporation is remote, uncertain and speculative.

These cases have been so recently decided that it is hardly necessary to review in detail the situation presented in each of them. In the *Dravo* and *Silas Mason*

Co. cases the Court upheld a state tax on the gross receipts of a government contractor. In the *Atkinson* case the Court upheld a state tax on the net income of a government contractor even though the income received by the contractor from the Federal government was included in his gross income before calculating his net income. In the *Mountain Producers Corp.* case the Court overruled two earlier decisions and held that the lessee of state owned oil lands was subject to the Federal income tax. In the *Gerhardt* case the Court held that an employee of the Port of New York Authority was not immune from a Federal income tax on his salary. In the *University of Georgia* case the Court held that the admissions charged by the University of Georgia to football games were subject to the Federal admissions tax even though the proceeds of such admissions were used to a large extent for educational purposes which were admittedly governmental in their nature. And in the *O'Keefe* case the Court held that the salary of an employee of the Home Owners' Loan Corporation was not immune from the income tax imposed on the employee by the State of New York.

In the *Dravo* case Mr. Chief Justice HUGHES said:

> "The application of the principle which denies validity to such a tax has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

And in the *Gerhardt* case Mr. Justice STONE said:

> "With the steady expansion of the activity of state governments into new fields they have undertaken the performance of functions not known to the

states when the Constitution was adopted, and have taken over the management of business enterprises once conducted exclusively by private individuals subject to the national taxing power. In a complex economic society tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on economically and thus to burden the state government itself. But if every Federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation."

In the *O'Keefe* case Mr. Justice STONE again said:

"The only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions."

And in speaking of the *Gerhardt* case, Mr. Justice STONE said:

"It was there pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the

other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. * * * It was further pointed out that, as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits by relieving them from contributing their share to the financial support of the other government whose benefits they enjoy, or to give an advantage to that government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private, but to prevent undue interference with the one government by imposing on it the tax burdens of the other. * * * The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments."

In some of the earlier cases the Court indicated that any tax which in any way affected a governmental agency of the Federal government was invalid, but it is abundantly clear that this is not the test laid down in the recent decisions above referred to. It may safely be said that a tax imposed on a governmental agency is not invalid unless the burden of the tax be "palpable and direct" rather than "hypothetic and remote" and a state tax is not a burden on the government if it

does "not interfere in any substantial way with the performance of Federal functions". Immunity does not exist unless the burden on the Federal agency is actual and substantial and not merely conjectural. The Court is not concerned with any "speculative and uncertain" economic effect which a tax may have on a governmental agency.

C.

The Maryland Recordation Tax Is Not a Burden.

There can hardly be any doubt but that the burden of the Maryland recordation tax on the Home Owners' Loan Corporation, if it exists at all, is wholly speculative, uncertain and conjectural. Indeed it would seem to be clear that the tax is actually no burden at all on the Home Owners' Loan Corporation. Certainly the tax is not levied against the corporation even though it may be paid by the corporation. If immunity from the tax is granted to the corporation, its borrowers, who are citizens and residents of the State of Maryland and owners of property therein, will benefit but the corporation will certainly not benefit. Any contention to the contrary simply ignores the facts. It is clear that the claimed immunity would do no more than relieve residents of Maryland from the duty of financial support to the State of Maryland in order to secure to the Home Owners' Loan Corporation a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from the tax.

If the tax is in effect paid by the borrower what possible burden can there be on the Home Owners' Loan Corporation? The case is even clearer than the *Ger-*

hardt and *O'Keefe* cases. In those cases it could be and was argued that the income tax on the employees of the Port of New York Authority in the one case and the Home Owners' Loan Corporation in the other increased the expense of operation of these governmental agencies. Yet this Court held that the supposed burden was too conjectural and remote and infringed no constitutional immunity. But in the case at bar not even this conjectural and remote burden exists. The tax does not, either directly or indirectly, increase the cost of operation of the Home Owners' Loan Corporation. Not even the economic burden of the tax is passed on to it. The only advantage which can be derived by the Home Owners' Loan Corporation from a grant of immunity is a purely competitive advantage over private lending agencies resulting from the bounty accruing to those who borrow from the Home Owners' Loan Corporation. This is so, because in practice the recordation tax on a mortgage is paid by the mortgagor. No part of the tax need be paid by the Home Owners' Loan Corporation. Its only function in connection with the tax is to require its borrower to pay the tax in order that the mortgage may be recorded.

It might be argued that the obligation of collecting the tax from the borrower and paying it to the clerk of the Court upon the recordation of the mortgage is in itself a burden on the Home Owners' Loan Corporation and an interference with its operations. It may very well be that in some infinitesimal degree the cost of operation of the Home Owners' Loan Corporation is increased by the necessity imposed upon it to collect the tax from the borrowers and pay it to the State. Certainly, however, the economic effect of this simple burden upon the Home

Owners' Loan Corporation is much less capable of measurement than the economic effect on the Home Owners' Loan Corporation of a state income tax imposed upon its employees, which this Court held to be too remote, conjectural and uncertain to be considered. As a matter of fact, the small duty thus imposed upon the Home Owners' Loan Corporation would probably not increase its expense of operation in any degree. The tax would be collected from the borrower at the time the mortgage loan was consummated. The Home Owners' Loan Corporation usually employs attorneys for this purpose and it could hardly be seriously contended that the fees of such attorneys are increased because of the slight additional work involved in collecting the tax from the borrower and paying it to the State.

D.

The Nature of the Function Performed by the Home Owners' Loan Corporation Must Be Considered.

Even if the Maryland recordation tax were levied directly against the Home Owners' Loan Corporation and required to be paid by that Corporation, it is our contention that the tax would nevertheless be valid. There would be no implied constitutional immunity from even such a direct tax because the tax, even though it were required to be paid by the Home Owners' Loan Corporation, would not operate to hamper, impede or obstruct the Home Owners' Loan Corporation in the performance of the governmental functions delegated to it by the Act of Congress. This is so because of the nature of the functions exercised by the Home Owners' Loan Corporation which must necessarily be considered in determining whether or not a tax operates to hamper,

impede or obstruct the performance of these functions, so as to constitute an unlawful burden upon it.

In dealing with the question of the immunity of State agencies from Federal taxation, this Court has distinguished between agencies exercising governmental functions and those exercising proprietary functions. While recognizing that immunity from Federal taxation exists in the case of those State agencies which exercise governmental functions, this Court has refused to recognize that any such immunity exists in the case of State agencies which exercise proprietary functions. The distinction is made in *South Carolina vs. United States*, 199 U. S. 437, where a Federal tax on a State owned liquor dispensary was upheld, and is again even more sharply drawn in *Allen vs. Regents of University System of Georgia*, 304 U. S. 439, where the Court held that admissions to football games between educational institutions were subject to the Federal admissions tax even though the proceeds of such admissions were used for educational purposes, which purposes were admittedly of a governmental nature. It must not be forgotten that the whole purpose and object of the distinction, as first applied in the *South Carolina* case, and strongly emphasized in the *University of Georgia* case, was to preserve to the Federal government those sources of tax revenue to which it had theretofore resorted. The motive of the Court was to preserve the taxing power of the Federal government, in a period marked by an extension of State activity into fields theretofore occupied exclusively or primarily by private enterprise. The argument applies with equal or greater force in a period like the present, which is marked by a tremendous expansion of Federal activity in fields, such as the lending field, heretofore

occupied by private enterprise. See note 49 Harvard Law Review 1323.

In the *Gerhardt* and *O'Keefe* cases the Court has apparently adopted the view that in dealing with Federal agencies no distinction is to be made between those exercising proprietary functions and those exercising governmental functions. The argument is that since the Federal government is a government of delegated powers and since the laws passed by Congress within its constitutional sphere of action are the supreme law of the land, any agency created by Congress in the exercise of the powers expressly or impliedly delegated to it by the Constitution is necessarily a governmental agency. Granted that for all practical purposes the constitutional power of Congress is as broad as the power of the States, to set up proprietary agencies in the general welfare, the problem of protecting the taxing power of the States and preserving the balance of Federal-State relations still remains.

The conclusion that either a State agency or a Federal agency is exercising governmental functions does not preclude further inquiry into the question of whether or not such a governmental agency, either State or Federal, can assert an implied constitutional immunity from a particular tax. This is made abundantly clear by both the *Gerhardt* case and the *O'Keefe* case. In the *Gerhardt* case, the conclusion was reached that the Port of New York Authority was a State governmental agency and in the *O'Keefe* case the conclusion was reached that the Home Owners' Loan Corporation was a Federal governmental agency. Nevertheless, in each of these cases the Court deemed it necessary to consider whether or not an income tax levied upon the salaries of the employees of

each of these two governmental agencies constituted a burden upon the agency. The Court concluded that the tax did not constitute a burden and accordingly held that there was no implied constitutional immunity from the tax in either case. In other words, it is entirely possible that an agency, either State or Federal, admittedly governmental in its nature, may not be immune from a particular tax.

The distinction drawn, in the case of State agencies, between those exercising proprietary functions and those exercising governmental functions seems to come to no more than this. In the case of those State agencies which the Court finds are exercising merely proprietary functions, it is not necessary for the Court to inquire whether a particular tax imposed upon such agencies is or is not a burden. There is no implied constitutional immunity from the tax regardless of the fact that it may impose a most exacting burden. On the other hand, if a State agency is exercising a governmental function, there may be a constitutional immunity from the tax and it is then necessary for the Court to inquire whether or not the challenged tax does in fact impose a direct and palpable burden upon the State agency. If so, there is an implied constitutional immunity; if not, there is no immunity. The only difference to be noted in dealing with Federal agencies is that the Court does not consider that any of such agencies may not be governmental agencies and hence it is necessary in each case involving a tax upon a Federal governmental agency to inquire whether or not the tax in fact does impose a direct and palpable burden upon the Federal agency. If so, there is an implied immunity from the tax; if not, there is no immunity from the tax.

In the case at bar we are concerned with the question of whether a Federal agency has an immunity from a particular tax. We concede that the Home Owners' Loan Corporation is a Federal governmental agency and hence an agency which *may* be entitled to a constitutional immunity from tax, but this does not mean that the Court is precluded from any inquiry into the nature of the function exercised by the Home Owners' Loan Corporation. Even though the Home Owners' Loan Corporation is a governmental agency, it is still necessary to determine whether or not the challenged tax imposes a direct and palpable burden upon it. Manifestly, the Court cannot determine whether or not the tax does impose a direct and palpable burden upon the Federal agency, so as to retard, obstruct or impede it in the performance of the functions delegated to it by Congress, without acquainting itself with the nature of the function. In other words, the Court must ascertain with considerable exactness the nature of the function to be exercised by the Federal governmental agency in order to determine whether or not the challenged tax operates to restrict, obstruct, retard or impede the performance of that function, and conversely, whether the benefit to be derived from immunity is outweighed by the detriment to the State, which is cooperating with the Federal government in the attainment of common governmental ends.

Whether we call Federal agencies governmental or proprietary in their nature can make no difference. The immunity from tax cannot be conferred by the label we give to the agency asserting the immunity. A nondiscriminatory tax levied alike upon a governmental agency, as well as upon all private agencies engaged in similar activities, may very well be considered not a burden upon the Federal agency.

If the contrary view is adopted, it would necessarily result that almost every tax which in any way, no matter how indirectly and remotely, affected the operations of a Federal agency, would be invalid to that extent. The consequences of any such decision are immediately apparent. We cannot close our eyes to the fact that the Federal Government is daily broadening the sphere of its activities. It is constantly setting up agencies which compete with private agencies engaging in similar activities. Carried far enough, an immunity from tax would result in a very serious drying up of the States' sources of revenue. Certainly no such result is required by any decision of this Court and it is not necessary that such a result be achieved in order to protect the Federal government in the performance of the functions delegated to it by the Constitution.

It must constantly be remembered that this Court has always sought, in order to preserve our dual system of government, to avoid unnecessary encroachment by the one government upon the field of activities consigned to the other. To the extent that it is necessary to accomplish this purpose, the governmental agencies of the Nation have an implied constitutional immunity from tax by the States, but this immunity can extend no further than the necessity of the case requires. A decision that a Federal agency engaging in activities in competition with private industry has an immunity from *all* taxation by a State goes far beyond the necessities of the case. The grant of immunity is not necessary to protect the agency in such a case. It would constitute a bounty which the State would be forced to contribute to the Federal agency and would operate to deprive the States of legitimate sources of revenue. In the final

analysis, no advantage would accrue to the Nation as a whole.

In the case at bar it seems to be entirely clear that the net result of granting the immunity would be to deplete the State's revenue, and impair its ability to match Federal funds in the field of social security, and to give aid to its most destitute citizens. At most, the only gain to the Federal government would be in a reduction pro tanto, in the cost of its lending operations, which it might pass on to borrowers in lowered interest rates, or use for other purposes. That a slight and indeterminate increase in costs of operation is no ground for immunity, was expressly decided in the *O'Keefe* case. In the case at bar, we have the further consideration that any immunity enjoyed by a Federal agency operates to the disadvantage of competing, private lending agencies. It may be urged that only necessitous borrowers are accommodated by the Home Owners' Loan Corporation, but this argument can hardly apply to such agencies as the Reconstruction Finance Corporation or the National Banks.

Bearing in mind that the Maryland tax is not discriminatory and therefore does not on its face impose a burden upon the Home Owners' Loan Corporation, what facts are alleged to substantiate the claim to immunity? Although the petition for mandamus alleges that the tax "is an unlawful interference with the lawful operations of your petitioner, placing a burden, impediment, and obstruction upon its functions and thus operating to hinder, delay and embarrass your petitioner in the exercise of the duties imposed upon it by the law of the Congress of the United States" (R. 3), no attempt is made to show in what way or to what degree that tax is an unlawful interference with the operations of the Home Owners' Loan Corporation or in what manner it places

a burden, impediment or obstruction upon its functions. These matters are left wholly to conjecture. If, as we have argued, the fact that the tax is non-discriminatory creates a presumption in favor of its validity, throwing upon him who claims an immunity the responsibility of showing that the tax operates to impede or obstruct the functions of the government, then certainly the respondent has failed to meet the duty thus cast upon it. Such burden as is assumed, rather than shown to exist, is most certainly hypothetic and remote. The truth of the matter is that no attempt is made to show in what manner the tax operates to obstruct or impede the operations of the Home Owners' Loan Corporation because it cannot be shown that such is the case, and any attempt to do so must fail. This being the case the claimed immunity must likewise fall.

We respectfully submit that the Maryland recordation tax imposes no direct and palpable burden upon the Home Owners' Loan Corporation and therefore mortgages on Maryland property from residents of Maryland to the Home Owners' Loan Corporation are not exempt from the Maryland recordation tax.

IV.

CONGRESS HAS NOT CONFERRED UPON THE HOME OWNERS' LOAN CORPORATION AN IMMUNITY FROM THE MARYLAND RECORDATION TAX.

A.

The Home Owners' Loan Act of 1933 Does Not Confer Such an Immunity.

In *Graves vs. New York, ex rel. O'Keefe, supra*, the Court said:

> "There has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation."

The respondent claims that the Home Owners' Act of 1933 has granted an immunity from the Maryland recordation tax. The petitioner asserts that the Home Owners' Act of 1933 does not purport to grant such an immunity. The respondent relies upon that part of Section 1463(c) of the Act which provides as follows:

> "The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

It seems to us clear that the taxes from which immunity is thus expressly granted by the Act of Congress are taxes levied directly against the Home Owners' Loan Corporation or its personal property. In the case at bar there is no tax levied directly against the Home Owners' Loan Corporation or its property. It is, of course, obvious that the recordation tax is not a tax on the franchise of the corporation or its capital, reserves and surplus, or its income. It is contended, however, that it is a tax on the loans of the corporation.

The short answer to this contention is that the tax, as we have pointed out above, is not imposed upon the Home Owners' Loan Corporation nor required to be paid by it. In practice the tax is paid by the borrower. Manifestly, therefore, the tax is not imposed upon the corporation with respect to its loans even if it were conceded that the loans and the mortgages of the Home Owners' Loan Corporation are one and the same thing.

The mortgage is, of course, the evidence of the loan and we would concede that a direct property tax levied upon the mortgages held by the Home Owners' Loan Corporation would be a tax intended to be prohibited

by the Act of Congress, although, even in that case, the question of whether the tax constituted a burden would still be open. The Maryland recordation tax is, however, not such a tax. It is not a recurring tax required to be paid annually nor a tax levied upon either the Home Owners' Loan Corporation or its borrower with respect to the ownership of property. It is purely an excise tax levied upon the privilege of recording a mortgage among the land records or chattel records of the State of Maryland. This does not seem to us to be the kind of a tax contemplated by Congress when it undertook to prohibit the States from levying a tax upon the loans of the Home Owners' Loan Corporation.

The distinction is made clear, we think, when it is realized that states do sometimes impose taxes upon loans as evidence of property. A state is not compelled to furnish a system of registry for recording of deeds and mortgages. Such a system is a service rendered by the State to the citizens for their benefit and to make more certain the titles to real and personal property and to protect persons dealing with such property. There is then, a vast difference between a tax upon a loan as property, and an excise tax upon the privilege of recording, a privilege which the state is not required to furnish. It seems to us that the former was contemplated by the Act of Congress but that the latter was not.[22]

[22] This Court has recognized similar distinctions in holding valid both State and Federal estate and inheritance taxes on the transfer at death of both State and Federal securities, even though a direct property tax on such securities would have been invalid under the decisions of this Court. See *United States vs. Perkins*, 163 U. S. 625; *Plummer vs. Coler*, 178 U. S. 115; and *Snyder vs. Bettman*, 190 U. S. 249. This Court has also recognized the distinction between a tax on real estate and a tax on the income therefrom, *New York ex rel. Cohn vs. Graves*, 300 U. S. 308, and the distinction between a tax on Federal securities and a tax on the capital stock of a corporation measured in part by the value of Federal securities owned by the corporation, *Schuylkill Trust Co. vs. Pennsylvania*, 302 U. S. 506.

If the Act of Congress does not expressly grant an immunity from the tax there is no basis for implying an intent to Congress to exempt the Home Owners' Loan Corporation "from tax burdens which are unsubstantial or which courts are unable to determine". As said by the Court in *Graves vs. New York, ex rel. O'Keefe, supra:*

> "Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

As we shall point out, a serious constitutional question will arise if the statute is construed to prohibit a tax upon the privilege of recording deeds and mortgages. The proposition is well established, that if a statute is susceptible of two interpretations, one of which will make the statute constitutional and valid, and the other of which raises serious doubt as to constitutionality, the courts will adopt the former.[23] This being the case, the Home Owners' Loan Act of 1933 should be so construed as not to prohibit the Maryland recordation tax. Only in that way can the constitutional question which would necessarily arise if any other construction were given to the Act, be avoided.

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[23] See *Anniston Mfg. Co. vs. Davis*, 301 U. S. 337; *United States ex. La Franca*, 282 U. S. 568; *Reinecke vs. Northern Trust Co.*, 278 U. S. 339; *St. Louis Southwestern R. Co. vs. Arkansas*, 235 U. S. 350; and *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S. 531.

We do not mean to say that if the statute is given the construction contended for by us the necessity for discussion of the question of immunity is eliminated. We would then simply have a case where Congress has given no intimation of any purpose either to grant or to withhold immunity from the tax. Whether there is an immunity from the tax would then depend entirely upon whether there was an implied constitutional immunity. See *Graves vs. New York; ex rel. O'Keefe, supra.*

B.

Congress Has No Power to Grant an Immunity of Greater Extent Than the Constitutional Immunity.

This Court in *Graves vs. New York, ex rel. O'Keefe, supra,* expressly left open the question of whether Congress could grant an immunity from taxation broader than the implied constitutional immunity, saying:

> "Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined."

Neither do we think the question need be determined in the case at bar. For as we have pointed out above, the Home Owners' Loan Act of 1933 need not be construed so as to indicate an attempt on the part of Congress to grant to the Home Owners' Loan Corporation an immunity from the Maryland recordation tax. Nevertheless, if this Court should feel that the Home Owners' Loan Act of 1933 does purport to grant such an immunity, then we strongly urge that the Act is, to that extent, unconstitutional and void, because Congress has no power to confer upon agencies of the Federal govern-

ment an immunity from State taxation which is broader and more extensive than the implied constitutional immunity.

It should suffice to point out here that even if such a power did exist in Congress in certain instances, it does not exist with respect to the Home Owners' Loan Corporation, because the only justification for such a power in Congress would be that it was necessary in order for Congress to fully carry out and perform the functions delegated to it by the Constitution. The power could, therefore, never be broader than was necessary to protect the agency created by Congress to carry out the powers expressly delegated by the Constitution to Congress. Assuming that Congress has the power to authorize the creation of the Home Owners' Loan Corporation to assist needy home owners by refinancing mortgages on their homes, it is, we submit, clear that an immunity from the Maryland recordation tax is not necessary or needful to protect the agency in the performance of that function. Consequently the power to grant immunity would be entirely lacking.

But it seems to us that the idea that Congress has any power whatsoever to grant to any of its federal governmental agencies an immunity from taxation broader and more extensive then the implied constitutional immunity, is based upon reasoning which is fallacious. As stated by the Court in the *O'Keefe* case, it is argued that the Federal government is one of delegated powers, in the exercise of which Congress is supreme so that every agency which Congress creates to carry out its purposes is a governmental agency. It is then argued that if Congress has the constitutional power to create the agency it has the implied power to protect the agency in the per-

formance of its governmental functions and that if an immunity from taxation is necessary, then Congress can grant such an immunity. But such an argument begs the question. If an immunity from taxation is necessary to protect a federal agency in the performance of a governmental function devolved upon it by Act of Congress, then any tax which interferes with the performance of the function constitutes a burden upon the Federal agency. If so, there is an implied constitutional immunity from the tax. On the other hand, if the tax does not interfere with the performance of the governmental function by the Federal agency, then it constitutes no burden on the agency and there is no implied constitutional immunity from the tax. But in this event there would be no necessity for an immunity to protect the Federal agency in the performance of its governmental functions, and it would therefore not be necessary for Congress to grant such an immunity in order to enable the Federal agency to carry on its activities. If there is no such necessity, then clearly the power to grant immunity from tax could not be derived from the implied power of Congress "to do whatever is needful or appropriate to carry out the powers delegated to it by the Federal Constitution".

As thus analyzed it will be seen that the idea that Congress has some power, the limits of which are not defined, to grant an immunity from tax broader and more extensive than the implied constitutional immunity, is without foundation.

In other words, if we concede the power of Congress to grant to a governmental agency whatever tax immunity is necessary to protect and safeguard that agency in the performance of the governmental functions dele-

gated to it by Congress, we merely concede the implied constitutional immunity of a Federal agency from taxation which substantially interferes with the performance of its governmental functions. If we go beyond this, then we must necessarily say that the Congress has the power to grant to an agency created by it an immunity from taxation, not merely to the extent that such an immunity is necessary to protect the agency in the performance of its governmental functions, but to a greater, undefined extent. If it should be said that the power of Congress to grant immunity from tax to an agency created by it is not limited to the grant of such immunity only as is necessary to protect the agency in the performance of its governmental functions, then there would be no limit whatsoever upon the power of Congress to grant immunity from taxation.

Entirely apart from the fact that there would be absolutely no justification for such a concept of the power of Congress, any such rule would have disastrous consequences because it would mean that the power of Congress to grant immunity from tax to an agency created by it would be absolute, and unrestricted by any constitutional limitation. The argument that the States, through their representatives in Congress, can prevent any undue expansion of Federal activity into fields heretofore served by private industry and initiative, loses its force in the face of existing realities. Representatives of States whose welfare depends more and more upon receiving a share of Federal funds, can hardly resist the inevitable pressure in favor of Federal immunity from State taxation. This Court has recognized the practical necessity of protecting each sovereign from an exorbitant exercise of the taxing power of the other. It can-

not consistently hold that an immoderate and unnecessary exercise of the power to exempt from tax is limited only by legislative or congressional self-restraint.

In this connection, we may quote the pertinent comment of Mr. Justice ROBERTS, dissenting in *James vs. Dravo Contracting Co., supra:*

> "No one denies the competence of the Congress to waive the immunity in whole or in part. But this is the reverse of saying the power to tax federal means and operations exists in the States subject to veto by Congress of any exorbitant exercise of the power. And it may be pertinent to suggest that if, as the Court has always held, the immunity is reciprocal, the State, by a parity of reasoning, ought to have the power to prohibit federal taxes upon State operations, if they be deemed immoderate."

The statutory declaration by Congress of immunity from tax for any particular Federal agency, need not be wholly disregarded; this Court may give it due weight as indicating the opinion of Congress as to whether any particular tax would or would not constitute such a substantial burden on the agency, as to retard, impede or obstruct its operations. Or, as was suggested in *Plummer vs. Coler*, 178 U. S. 115, 118, a statutory declaration of immunity might be treated as a manifestation that Congress did not intend to waive the implied constitutional immunity. For instance, in *Baltimore National Bank vs. State Tax Commission*, 297 U. S. 209, this Court held that Congress had, by the National Bank Act, permitted the States to tax the shares of stock of national banks owned by the Reconstruction Finance Corporation. Shortly after this decision Congress passed an Act expressly exempting such national bank stock, owned by the Reconstruction Finance Corporation, from taxa-

tion by the States. See Act of March 20, 1936, 49 Stat. 1185, 12 U. S. C., Section 51d.

A statutory declaration of immunity may therefore be treated as an expression of congressional opinion as to the necessity for immunity, or as negativing any implication of a waiver of the immunity by Congress, or both. But beyond this point we submit that the question of whether immunity exists in any particular case depends upon whether it can be implied from the Constitution, and in every case this is a judicial and not a legislative question.

CONCLUSION.

We earnestly contend that the recordation of a mortgage on Maryland real estate, from a citizen of the State of Maryland to the Home Owners' Loan Corporation, is not immune from the Maryland recordation tax in view of the fact that the tax is not discriminatory, and that the burden of the tax on the Home Owners' Loan Corporation is speculative, remote and uncertain, if it exists at all. We therefore urge that the judgment of the lower Court be reversed.

Respectfully submitted,

WILLIAM C. WALSH,
Attorney General of the State of Maryland,

WILLIAM L. HENDERSON,
Deputy Attorney General,

H. VERNON ENEY,
Asst. Attorney General,

Attorneys for Petitioner.

APPENDIX.

Excerpt from Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland of 1937.

CHAPTER 11.

"AN ACT * * * to add two new Sections to Article 81 of the Annotated Code of Maryland (1935 Supplement), to be under the sub-title 'Tax on the Recordation of Instruments in Writing', said new sections to be known as Sections 213 and 214, to follow immediately after Section 212 of said Article, imposing a tax upon the recordation of instruments in writing * * *."

* * * * * * *

"Sec. 4. AND BE IT FURTHER ENACTED, That three new sections be and they are hereby added to Article 81 of the Annotated Code of Maryland (1935 Supplement), to be under the sub-title 'Tax on the Recordation of Instruments in Writing', said new sections to be known as Sections 213 and 214, to follow immediately after Section 212 of said Article, and to read as follows:

"213. A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics' liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction.

"The tax hereby imposed shall be at the rate of 10¢ for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and at the rate of 10¢ for each $100, or fractional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt.

"In addition to the tax hereby imposed, the Clerks shall collect a charge of 50¢ for each such instrument recorded or offered for record.

"214. No such instrument shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. The Comptroller shall supply to the Clerks of the Circuit Courts of the respective Counties or the Clerk of the Superior Court of Baltimore City, stamps to evidence the payment of said tax, for sale to persons offering such instruments for record, under such rules and regulations as the Comptroller may prescribe. The proceeds from the sale of said stamps, together with the recordation charges herein provided, shall be accounted for and paid over to the Comptroller who shall deposit the same in the 'State Fund for Aid to the Needy' to be disbursed therefrom for the purposes and in the manner prescribed by law.

"It shall be unlawful for any person to record any written instrument referred to in this sub-title without having provided for the payment of the tax and recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction. Any person violating the provisions of this sub-title shall be subject to a fine of not more than $500.00 or to a sentence of not more than six months in jail."

§1461. Short title.

This chapter may be cited as the "Home Owners' Loan Act of 1933." (June 13, 1933, c. 64, §1, 48 Stat. 128).

§1462. Definitions.

As used in this chapter—

(a) The term "Board" means the Federal Home Loan Bank Board created under Chapter 11 of this title.

(b) The term "Corporation" means the Home Owners' Loan Corporation created under section 1463 of this chapter.

(c) The term "home mortgage" means a first mortgage on real estate in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed $20,000; and the term "first mortgage" includes such classes of first liens as are commonly given to secure advances on real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 1464 of this chapter. (June 13, 1933, c. 64, §2, 48 Stat. 128; June 27, 1934, c. 847, §508 (a), 48 Stat. 1264; May 28, 1935, c. 150, §10, 49 Stat. 296.)

§1463. Home Owners' Loan Corporation.

(a) *Creation; directors.* The Board is hereby authorized and directed to create a corporation to be known

as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such by-laws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation.

(b) *Capital stock; subscription by United States; allocation of funds by Reconstruction Finance Corporation.* The Board shall determine the minimum amount of capital stock of the Corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate $200,000,000. Such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments for such subscription shall be subject to call in whole or in part by the Board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The Corporation shall issue to the Secretary of the Treasury receipts for payments by him for or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States. In order to enable the Secretary of the Treasury to make such payments when called, the Reconstruction Finance Corporation is authorized and directed to allocate and make available to the Secretary of the Treasury the sum of $200,000,000, or so much thereof as may be necessary, and for such purpose the amount of the notes, bonds, debentures, or other such obligations which the Reconstruction Finance Corporation is authorized and empowered under section 609 of Title 15, to have outstanding at any one time, is hereby increased by such amounts as may be necessary.

(c) *Bond issue by corporation authorized; interest and principal guaranteed by United States; exemption*

from taxation. In order to provide for applications filed before May 28, 1935, for applications filed within thirty days thereafter, and for carrying out the other purposes of this section, the Corporation is authorized to issue bonds in an aggregate amount not to exceed $4,750,000,000, which may be exchanged as hereinafter provided, or which may be sold by the Corporation to obtain funds for carrying out the purposes of this section or for the redemption of any of its outstanding bonds; and the Corporation is further authorized to increase its total bond issue for the purpose of retiring its outstanding bonds by an amount equal to the amount of the bonds to be so retired (except bonds retired from payments of principal on loans), such retirement to be at maturity or by call or purchase or exchange or any method prescribed by the Board with the approval of the Secretary of the Treasury: *Provided*, That no bonds issued under this subsection, as amended, shall have a maturity date later than 1952. Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury

not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds of the Corporation issued under this subsection which are guaranteed as to interest and principal, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under Sections 752, 753 and 757 of Title 31, and the purposes for which securities may be issued under such sections are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed. No such bonds shall be issued in excess of the assets of the Corporation, including the assets to be obtained from the proceeds of such bonds, but a failure to comply with this provision shall not invalidate the bonds or the guaranty of the same. The Corporation shall have power to purchase in the open market at any time and at any price not to exceed par any of the bonds issued by it. Any such bonds so purchased may, with the approval of the Sec-

retary of the Treasury, be sold or resold at any time and at any price. For a period of six months after the date this subsection, as amended, takes effect, the Corporation is authorized to refund any of its bonds issued prior to such date or any bonds issued after such date in compliance with commitments of the Corporation outstanding on such date, upon application of the holders thereof, by exchanging therefor bonds of an equal face amount issued by the Corporation under this subsection as amended, and bearing interest at such rate as may be prescribed by the Corporation with the approval of the Secretary of the Treasury; but such rate shall not be less than that first fixed after this subsection, as amended, takes effect on bonds exchanged by the Corporation for home mortgages. For the purpose of such refunding the Corporation is further authorized to increase its total bond issue in an amount equal to the amount of the bonds so refunded. Nothing in this subsection shall be construed to prevent the Corporation from issuing bonds in compliance with commitments of the Corporation on April 27, 1934.

(d) *Exchange of bonds for mortgages; amortization of mortgages; interest rates.* The Corporation is authorized, for a period of three years after June 13, 1933, (1) to acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate (including the interest of a vendor under a purchase-money mortgage or contract) recorded or filed in the proper office or executed prior to June 13, 1933, and (2) in connection with any such exchange, to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction, and to pay such amounts, not exceeding $50, to the holder of the mortgage, obligation, or lien acquired as may be the difference between the face value of the bonds exchanged plus accrued interest thereon and the purchase price of the mortgage, obligation, or

lien. The face value of the bonds so exchanged plus accrued interest thereon and the cash so advanced shall not exceed in any case $14,000, or 80 per centum of the value of the real estate as determined by an appraisal made by the Corporation, whichever is the smaller. In any case in which the amount of the face value of the bonds exchanged plus accrued interest thereon and the cash advanced is less than the amount the home owner owes with respect to the home mortgage or other obligation or lien so acquired by the Corporation the Corporation shall credit the difference between such amounts to the home owner and shall reduce the amount owed by the home owner to the Corporation to that extent. Each home mortgage or other obligation or lien so acquired shall be carried as a first lien or refinanced as a home mortgage by the Corporation on the basis of the price paid therefor by the Corporation, and shall be amortized by means of monthly payments sufficient to retire the interest and principal within a period of not to exceed fifteen years; but the amortization payments of any home owner may be made quarterly, semiannually, or annually, if in the judgment of the Corporation the situation of the home owner requires it. Interest on the unpaid balance of the obligation of the home owner to the Corporation shall be at a rate not exceeding 5 per centum per annum. The Corporation may at any time grant an extension of time to any home owner for the payment of any installment of principal or interest owed by him to the Corporation if, in the judgment of the Corporation, the circumstances of the home owner and the condition of the security justify such extension. As used in this subsection, the term "real estate" includes only real estate held in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by

the owner as a home or held by him as his homestead, and which has a value of not to exceed $20,000. No discrimination shall be made under this chapter against any home mortgage by reason of the fact that the real estate securing such mortgage is located in a municipality, county, or taxing district which is in default upon any of its obligations.

For the purposes of this chapter, levies of assessments upon real property, made by any special district organized in any State for public improvements, shall be treated as general-tax levies are treated. The Board shall determine the reasonableness of the total annual burden of taxes and assessments of all kinds upon any property offered as security for the payment of a loan made by the Corporation and the effect of the total levies upon the loanable value of such property, but no deduction shall be made from the loanable value of any property for levies not due at the time of making such loan in any instance where the total annual taxes and assessments borne by the said property for all purposes does not exceed a sum which, in the discretion of the Board, is a reasonable annual tax burden for such property.

(e) *Cash loans on unincumbered property; interest.* The Corporation is further authorized, for a period of three years from June 13, 1933, to make loans in cash subject to the same limitations and for the same purposes for which cash advances may be made under subsection (d) of this section, in cases where the property is not otherwise encumbered; but no such loan shall exceed 50 per centum of the value of the property securing the same as determined upon an appraisal made by the Corporation. Each such loan shall be secured by a duly recorded home mortgage, and shall bear interest at the same rate and shall be subject to the same provisions with respect to amortization and extensions as are applicable in the case of obligations refinanced under subsection (d) of this section.

(f) *Cash Loans on mortgaged property; interest.* The Corporation is further authorized, for a period of three years from June 13, 1933, in any case in which the holder of a home mortgage or other obligation or lien eligible for exchange under subsection (d) of this section does not accept the bonds of the Corporation in exchange as provided in such subsection and in which the Corporation finds that the home owner cannot obtain a loan from ordinary lending agencies, to make cash advances to such home owner in an amount not to exceed 40 per centum of the value of the property for the purposes specified in such subsection (d). Each such loan shall be secured by a duly recorded home mortgage and shall bear interest at a rate of interest which shall be uniform throughout the United States, but which in no event shall exceed a rate of 6 per centum per annum, and shall be subject to the same provisions with respect to amortization and extensions as are applicable in cases of obligations refinanced under subsection (d) of this section.

(g) *Loans to redeem foreclosed property.* The Corporation is further authorized to exchange bonds and to advance cash to redeem or recover homes lost by the owners by foreclosure or forced sale by a trustee under a deed of trust or under power of attorney, or by voluntary surrender to the mortgagee subsequent to January 1, 1930, subject to the limitations provided in subsection (d) of this section.

(h) *Appraisal rules.* The Board shall make rules for the appraisal of the property on which loans are made under this section so as to accomplish the purposes of this chapter: *Provided*, That no person shall be allowed to act as appraiser if he is in the employ of any company holding a loan on the property, or if he is interested in the subject matter of the loan.

(i) *Payment of loans in bonds of Corporation.* Any person indebted to the Corporation may make pay-

ment to it in part or in full by delivery to it of its bonds which shall be accepted for such purpose at face value.

(j) *Officers and employees; compensation; free use of mails.* The Corporation shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this chapter, without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, or agents of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided by law in the case of the members of the Board. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this chapter and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The Corporation shall pay such proportion of the salary and expenses of the members of the Board and its officers and employees as the Board may determine to be equitable, and may use the facilities of Federal Home Loan Banks, upon making reasonable compensation therefor as determined by the Board. No person shall be appointed or retained as an officer, employee, agent, or attorney, at a fixed salary, in any regional or State Office of the Corporation who is an officer or director of any firm, corporation, or association engaged in lending money on real estate; nor shall any person be appointed or retained as an officer, employee, agent, or attorney in any State or district office of the Corporation, who has not been a bona fide resident of the State served by such office for a period of at least one year immediately preceding the date of his appointment.

(k) *By-laws, rules and regulations; cancellation of bonds; liquidation of Corporation; dividends.* The Board

is authorized to make such by-laws, rules and regulations, not inconsistent with the provisions of this section, as may be necessary for the proper conduct of the affairs of the Corporation. The Corporation is further authorized and directed to retire and cancel the bonds and stock of the Corporation as rapidly as the resources of the Corporation will permit. All payments upon principal of loans made by the Corporation shall under regulations made by the Corporation be applied to the retirement of the bonds of the Corporation. Upon the retirement of such stock, the reasonable value thereof as determined by the Board shall be paid into the Treasury of the United States and the receipts issued therefor shall be canceled. The Board shall proceed to liquidate the Corporation when its purposes have been accomplished, and shall pay any surplus or accumulated funds into the Treasury of the United States. The Corporation may declare and pay such dividends to the United States as may be earned and as in the judgment of the Board it is proper for the Corporation to pay.

(l) *When mortgagor must be in default.* No home mortgage or other obligation or lien shall be acquired by the Corporation under subsection (d), and no cash advance shall be made under subsection (f), unless the applicant was in involuntary default on June 13, 1933, with respect to the indebtedness on his real estate and is unable to carry or refund his present mortgage indebtedness: *Provided*, That the foregoing limitation shall not apply in any case in which it is specifically shown to the satisfaction of the Corporation that a default after such date was due to unemployment or to economic conditions or misfortune beyond the control of the applicant.

(m) *Advances for rehabilitation, modernization, etc., of homes.* In all cases where the Corporation is authorized to advance cash to provide for necessary maintenance and to make necessary repairs it is also authorized to advance cash or exchange bonds for the rehabilita-

tion, modernization, rebuilding and enlargement of the homes financed; and in all cases where the Corporation has acquired a home mortgage or other obligation or lien it is authorized to advance cash or exchange bonds to provide for the maintenance, repair, rehabilitation, modernization, rebuilding, and enlargement of the homes financed and to take an additional lien, mortgage, or conveyance to secure such additional advance or to take new home mortgage for the whole indebtedness; but the total amount advanced shall in no case exceed the respective amounts or percentages of value of the real estate as elsewhere provided in this section. Not to exceed $400,000,000 of the proceeds derived from the sale of bonds of the Corporation shall be used in making cash advances to provide for necessary maintenance and necessary repairs and for the rehabilitation, modernization, rebuilding and enlargement of real estate securing the home mortgages and other obligations and liens acquired by the Corporation under this section.

(n) *Purchase of obligations of other banks and associations.* The Corporation is authorized to purchase Federal Home Loan Bank bonds, debentures, or notes, or consolidated Federal Home Loan Bank bonds or debentures. The Corporation is also authorized to purchase full-paid-income shares of Federal Savings and Loan Associations after the funds made available to the Secretary of the Treasury for the purchase of such shares have been exhausted. Such purchases of shares shall be on the same terms and conditions as have been heretofore authorized by law for the purchase of such shares by the Secretary of the Treasury: *Provided*, That the total amount of such shares in any one association held by the Secretary of the Treasury and the Corporation shall not exceed the total amount of such shares heretofore authorized to be held by the Secretary of the Treasury in any one association. The Corporation is also authorized to purchase shares in any institution which is (1) a member of a Federal Home Loan Bank, or (2) whose accounts are insured under sections 1724

to 1730 of this title, if the institution is eligible for insurance under such title; and to make deposits and purchase certificates of deposit and investment certificates in any such institution. Of the total authorized bond issue of the Corporation $300,000,000 shall be available for the purposes of this subsection, without discrimination in favor of Federally chartered associations, and bonds of the Corporation not exceeding such amount may be sold for the purposes of this subsection. (June 13, 1933, c. 64, §4, 48 Stat. 129; April 27, 1934, c. 168, §§1 (a), 2, 3, 4, 13, 48 Stat. 643, 644, 645, 647; June 27, 1934, c. 847, §§506 (a), (b), 508 (b), 48 Stat. 1263, 1264; May 28, 1935, c. 150, §§10-16, 17 (a), 49 Stat. 296-297.)

§1463a. Bonds issued under original provisions; interest and principal.

The amendments made by the Act of April 27, 1934, to subsection (c) of section 1463 of this title (except with respect to refunding) shall not apply to any bonds prior to April 27, 1934, issued by the Home Owners' Loan Corporation under such subsection (c) of section 1463, or to any bonds thereafter issued in compliance with commitments of the Corporation outstanding on April 27, 1934. (April 27, 1934, c. 168 §1(b), 48 Stat. 644.)

Official opinion of the Attorney General of the State of Maryland reported in Volume 22 of the Report and Official Opinions of the Attorney General, page 721.

"July 10, 1937.

Mr. Edward Oswald,
Clerk, Circuit Court for
Washington County.

Your inquiry, received this morning, pertains to the question as to whom the Clerks of Courts shall look for the payment of the recordation tax, imposed by the recently enacted statute to affect instruments of writing recorded or offered for record throughout the State.

In our opinion it is not for the Clerk to concern himself as to the source from which the tax comes, which is paid at the time the instrument is offered for record. Under the terms of the Act, the Clerk is to require the payment of the tax at the time the instrument is offered for record. It is a matter of indifference who has supplied the necessary funds, just so the required amount is received in accordance with the legal provisions.

In other words, if the parties interested in the execution of the instrument desire to make a private arrangement among themselves, it is not the business of the State to concern itself with that phase of the situation. All that the State is interested in is receiving the tax at the time required for its payment.

HERBERT R. O'CONOR,
Attorney General."

No. 702

In the Supreme Court of the United States

OCTOBER TERM, 1938

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY, PETITIONER

v.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of Maryland (R. 19–23) is not yet officially reported. The memorandum opinion of the Baltimore City Court (R. 9–17) is not reported.

JURISDICTION

The order of the Court of Appeals of the State of Maryland was entered on December 1, 1938 (R. 18). The petition for a writ of certiorari was filed February 25, 1939 (R. 24). The jurisdiction of

this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a mortgage executed to the Home Owners' Loan Corporation, an instrumentality of the Federal Government, is subject to state documentary and recording taxes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 13–15.

STATEMENT

This action was instituted in the Baltimore City Court by the respondent by petition for a writ of mandamus (R. 1–5) to compel the petitioner, as Clerk of the Superior Court of Baltimore City, to receive and record a mortgage executed to the respondent upon payment of the usual recording fee, but without payment of the recording tax and affixation of the documentary stamps prescribed by the laws of the State of Maryland. The petitioner demurred to the respondent's petition for a writ of mandamus (R. 8). The Baltimore City Court overruled the petitioner's demurrer "with leave to answer within 30 days." (R. 9.) The petitioner elected to stand upon his demurrer and filed no answer to the respondent's petition for a writ of mandamus. (R. 17.)

The material facts as alleged in the petition for a writ of manudamus (R. 1–5) and admitted by the demurrer (R. 8) are as follows:

The Home Owners' Loan Corporation of Washington, D. C., the respondent, is a corporate instrumentality of the United States of America, organized, existing and operating pursuant to Section 4 of the Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, as amended (U. S. C., Title 12, Sec. 1463), whose entire capital stock is owned by the United States and as such has been operating in the several States and in the State of Maryland. (R. 1.)

In the course of the respondent's operations, Martin J. Burns and Mary Burns, his wife, of Baltimore, Maryland, conveyed to it by the execution and delivery of a mortgage dated the 11th day of March 1938 (R. 1, 5–8), a leasehold estate and term of ninety-nine years from June 10, 1893, renewable from time to time forever and subject to the payment of an annual ground rent of $42.25 in and to the dwelling property in Baltimore City, Maryland, known as No. 435 East 27th Street, to secure the repayment of an advance made by the respondent to the mortgagors of $111. This advance was made for the sole purpose of defraying the cost of repairs and reconditioning to the property conveyed which were necessary to preserve the property as security for an original loan made to the mortgagors by the respondent on July 11, 1934. (R. 2).

In order to preserve and protect the respondent's lien and to enjoy the full benefits of the mortgage, it is a legal necessity under the laws of Maryland that the mortgage in question be recorded among the land records of the City of Baltimore as required and directed by the law of Maryland. (R. 2.)

The petitioner is the duly qualified Clerk of the Superior Court of Baltimore City, and under the provisions of Article 4, Section 38 of the Constitution of Maryland, as Clerk of the Superior Court of Baltimore City, is entrusted with the land records of the City of Baltimore, and it is his duty to receive and record all deeds, mortgages, conveyances, and other papers entitled or required by law to be recorded in the land records of the City of Baltimore. (R. 2.)

On March 12, 1938, the respondent, through its agent and employee, at the office of the Clerk of the Superior Court of the City of Baltimore during the hours when that office was open for the transaction of business tendered to the petitioner, as Clerk of the Superior Court of Baltimore City, the mortgage executed and delivered to it by Martin J. Burns and Mary Burns (R. 5–8) duly executed and acknowledged, and in all respects ready and eligible for recording under the registration laws of the State of Maryland, together with a fee of $2.50, the lawful charge for recording the mortgage, and requested and demanded that the mortgage be

received and recorded among the land records of the City of Baltimore as provided by law (R. 2–3).

The petitioner, as Clerk of the Superior Court of Baltimore City, upon tender of the mortgage for recordation and the usual fee exacted for recording, refused to receive the mortgage for recordation, and refused to record the mortgage unless and until the respondent paid to him for the use of the State of Maryland, in addition to the usual fee for recording, a recording tax of fifty cents, and also unless and until State of Maryland documentary stamps amounting to twenty cents in cost were purchased, affixed to the mortgage, and cancelled. (R. 3.)

Whereupon the respondent petitioned the Baltimore City Court for a writ of mandamus to compel the petitioner, as Clerk of the Superior Court of Baltimore City, to record the mortgage in issue upon payment of the lawful and usual fee for such service, alleging in the petition (R. 3–4) that it was immune from the Maryland stamp and recording taxes demanded by the petitioner (1) by virtue of the provisions of Section 4 (c) of the Home Owners' Loan Act of 1933 as amended and (2) as an instrumentality of the United States of America engaged in the functions of the Federal Government, state taxation of which is precluded by constitutional limitation.

The petitioner demurred to the petition for writ of mandamus. The demurrer having been overruled with leave to answer, which the petitioner

elected not to do, the Baltimore City Court granted the writ of mandamus petitioned for. (R. 17–18.) The Court of Appeals of Maryland affirmed. (R. 18, 23.)

ARGUMENT

The recordation and documentary stamp taxes imposed by Sections 213 and 214 of Article 81 of the Code of General Laws of Maryland (as enacted by Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland of 1937) are in no sense charges for services incident to the recording of the mortgage in question. No contention to the contrary is made by the petitioner and, as the Court of Appeals of the State of Maryland held, the decision of this Court in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, is controlling here. Moreover petitioner concedes (Pet. 12) "if the decision in the *Crosland* case is still to be considered as a binding precedent in spite of the recent decisions of this Court, then the decision of the Court below was correct."

The petitioner contends that recent decisions of this Court, particularly in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Helvering* v. *Gerhardt*, 304 U. S. 405, have established principles which so qualify *Federal Land Bank* v. *Crosland* as to nullify that decision as a binding precedent here. In support of this contention it is argued (1) that the functions and activities of the Home Owners' Loan Corporation are proprietary and

nongovernmental, (2) that no burden results to the Home Owners' Loan Corporation from the imposition of the taxes, and (3) that since the taxes are uniform and nondiscriminatory they are not invalid by constitutional limitation. In substance the petitioner's argument in support of the constitutional validity of the taxes is that the doctrine of implied immunity is not only one mechanically reciprocal in application, but also that the factors and principles entering into the determination of an individual taxpayer's immunity from an income or gross receipts tax are equally applicable and decisive in the case of an instrumentality of the Federal Government which is sought to be subjected to state privilege or license taxes.

1. In the brief for the United States as *amicus curiae* in *Graves* v. *New York ex rel. O'Keefe,* No. 478, October Term, 1938, pp. 17–38, the Government has argued at large the first group of issues raised by petitioner. In that brief it is shown: (a) The doctrine of implied immunity protects equally the independence of both the State and the Federal governments within their respective spheres, but this by no means implies that there is a precise equivalence or mechanical reciprocity in the taxing powers of the two governments; the structure of the Federal Government and the supremacy clause of Article VI of the Constitution, as do the decisions of this Court, forbid such a rule. (b) The doctrine of proprietary or nonessential functions

is wholly inapplicable to the exercise by the United States of any of its delegated powers which, by definition, are governmental. There can, therefore, be no thought of applying such a test to the activities of the Home Owners' Loan Corporation. (c) If, however, such a test were to be applied, the activities of the Home Owners' Loan Corporation, undertaken in the exercise of the fiscal and the general welfare powers, are purely governmental. In the interest of brevity we incorporate by reference the argument made in the *O'Keefe* brief in support of these propositions.

2. Petitioner, in the second place, argues that the tax should be sustained because its imposition results in no burden on the Home Owners' Loan Corporation. In this argument he overlooks the basic consideration in the recent cases upon which he chiefly relies. *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *Helvering* v. *Gerhardt*, 304 U. S. 405. In each of these cases the taxpayers whose incomes were taxed were private corporations and individuals; any economic burden resulting to the governments could only have been transmitted to them by or through the private taxpayer. Accordingly, the Court ruled, as it said in the *Gerhardt* case, that even if the tax were to be considered an economic burden upon the Government, its impact was

merely conjectural. We do not have that situation here.

The Home Owners' Loan Corporation is an instrumentality of the United States. Its stock is wholly owned by the United States, and its functions are undertaken purely on behalf of the Government. "This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account." *Clallam County* v. *United States*, 263 U. S. 341, 345. It is thus a part of the United States Government and, unless waived by Congress, expressly or by implication, has every constitutional immunity which surrounds the operations of the ordinary departments of the Government.[1] There is here no waiver of the immunity of the Home Owners' Loan Corporation from a tax imposed by a State upon the recordation of its mortgages. Indeed, Section 4 (c) of the Home Owners' Loan Act of 1933, *infra*, declares that "the Corporation, including its franchise, its capital, reserves and surplus, and its loans and income" shall be exempt from all taxation. The tax upon the recordation of the mortgage seems plainly to contravene the exemption given the loans of the Corporation, since it is a tax imposed upon the means by which those loans are secured.

[1] See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421–422; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 208; *Federal Land Bank* v. *Crosland*, *supra*.

The tax at bar is imposed upon instruments offered for recordation. Plainly the Home Owners' Loan Corporation, rather than the mortgagor, will offer the mortgage for record and will be required in the first instance to pay the tax. The tax is thus one which is directed at the Government itself. It is immaterial that the Corporation, through increasing its charges to the mortgagor, might at once or when the loan is repaid reimburse itself from a private individual. The very considerations which in the recent decisions of this Court have led it to the conclusion that taxes upon a private person were not to be invalidated merely because the taxpayer dealt with the Government serve to show that a tax upon the Government itself is not to be sustained merely because it deals with a private person in transactions related to that upon which the tax is imposed. Moreover, even if the Home Owners' Loan Corporation were assured of complete reimbursement by the mortgagor, the State is powerless to add to the federal functions of the Corporation the duty of collecting Maryland privilege taxes.

3. Petitioner emphasizes that the tax is nondiscriminatory, and rests upon the Home Owners' Loan Corporation in common with all other mortgagees who offer instruments for recordation. This factor might be critical, if not determinative

of the issues, were the tax directed at a private person rather than the Government itself. But, apart from the qualification applicable in the case of proprietary or nonessential state activities, the implications of the Constitution have consistently been construed to forbid *any* tax imposed by the State or Federal government upon the other government itself.

A century and a half of constitutional practice, reflected in many decisions of this Court, forbid subjection of one government to the tax machinery of another. In this immunity of the government itself there arises no confusion or unfair tax discrimination comparable to that which follows any grant of immunity from a nondiscriminatory tax to a private person. For this reason, when the immunity is one of the government itself and does not carry with it the confusion and unfairness which follows a grant of tax exemption to private persons, it seems that there is no occasion to reexamine settled principles.

The authority of *Federal Land Bank* v. *Crosland, supra,* has not been qualified or limited by later decisions of the Court. Its principle has been applied not only by the Court of Appeals of Maryland, but in other jurisdictions as well. See *Federal Land Bank* v. *Hubard,* 163 Va. 860; *Home Owners Loan Corp.* v. *Anderson,* 145 Kans. 209.

CONCLUSION

Unless the court wishes to reexamine *Federal Land Bank* v. *Crosland, supra,* the petition should be denied.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
BERRYMAN GREEN,
Special Assistants to the Attorney General.
WARNER W. GARDNER,
Special Attorney.

HAROLD LEE,
General Counsel,
W. F. EVANS,
E. K. NEUMANN,
Attorneys,
Home Owners' Loan Corporation.

MARCH 1939.

APPENDIX

Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128:

SEC. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

* * * * *

(c) * * * The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation

to the same extent, according to its value, as other real property is taxed. * * * (U. S. C., Title 12, Sec. 1463.)

Laws of Maryland, 1937, Special Session, c. 11:

SEC. 4. *And be it further enacted,* That three new sections be and they are hereby added to Article 81 of the Annotated Code of Maryland (1935 Supplement), to be under the sub-title "Tax on the Recordation of Instruments in Writing", said new sections to be known as Sections 213 and 214, to follow immediately after Section 212 of said Article, and to read as follows:.

213. A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction.

The tax hereby imposed shall be at the rate of 10c for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and at the rate of 10c for each $100, or frac-

tional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt.

In addition to the tax hereby imposed, the Clerks shall collect a charge of 50c for each such instrument recorded or offered for record.

214. No such instrument shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. The Comptroller shall supply to the Clerks of the Circuit Courts of the respective Counties or the Clerk of the Superior Court of Baltimore City, stamps to evidence the payment of said tax, for sale to persons offering such instruments for record, under such rules and regulations as the Comptroller may prescribe. The proceeds from the sale of said stamps, together with the recordation charges herein provided, shall be accounted for and paid over to the Comptroller who shall deposit the same in the "State Fund for Aid to the Needy" to be disbursed therefrom for the purposes and in the manner prescribed by law.

It shall be unlawful for any person to record any written instrument referred to in this sub-title without having provided for the payment of the tax and recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction. Any person violating the provisions of this sub-title shall be subject to a fine of not more than $500.00 or to a sentence of not more than six months in jail:

U. S. GOVERNMENT PRINTING OFFICE: 1939

No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1939

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY, PETITIONER

v.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR THE RESPONDENT

★10-2-39

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 10

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY, PETITIONER.

v.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Maryland (R. 19–23) is not yet officially reported. The memorandum opinion of the Baltimore City Court (R. 9–17) is not reported.

JURISDICTION

The order of the Court of Appeals of the State of Maryland was entered on December 1, 1938 (R. 18). Petition for writ of certiorari was filed Feb-

ruary 25, 1939, and was granted April 17, 1939 (R. 24). The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a mortgage executed to the Home Owners' Loan Corporation is subject to state documentary and recording taxes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 63–67. The full text of the sections of the Home Owners' Loan Act of 1933 which deal with the H. O. L. C. are printed in the Appendix to the petitioner's brief, pp. 55–66.

STATEMENT

This action was instituted in the Baltimore City Court by the respondent's petition for a writ of mandamus (R. 1–5) to compel the petitioner, as Clerk of the Superior Court of Baltimore City, to receive and record a mortgage executed to the respondent upon payment of the usual recording fee, but without payment of the recording tax and affixation of the documentary stamps prescribed by the laws of the State of Maryland. The petitioner demurred to the respondent's petition for a writ of mandamus (R. 8). The Baltimore City Court overruled the petitioner's demurrer "with leave to answer within 30 days" (R. 9). The petitioner elected to stand upon his demurrer and filed no

answer to the respondent's petition for a writ of mandamus (R. 17).

The material facts as alleged in the petition for a writ of mandamus (R. 1–5) and admitted by the demurrer (R. 8) are as follows:

The Home Owners' Loan Corporation of Washington, D. C., the respondent, is a corporate instrumentality of the United States of America, organized, existing, and operating pursuant to Section 4 of the Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, as amended (U. S. C., Title 12, Sec. 1463), whose entire capital stock is owned by the United States and as such has been operating in the several states and in the State of Maryland (R. 1.)

In the course of the respondent's operations, Martin J. Burns and Mary Burns, his wife, of Baltimore, Maryland, conveyed to it by the execution and delivery of a mortgage dated the 11th day of March, 1938 (R. 1, 5–8), a leasehold estate, renewable from time to time forever and subject to the payment of an annual ground rent of $42.25, in and to the dwelling property in Baltimore City, Maryland, known as No. 435 East 27th Street, to secure the repayment of an advance made by the respondent to the mortgagors of $110. This advance was made for the sole purpose of defraying the cost of repairs and reconditioning to the property conveyed which were necessary to preserve the property as security for an original loan made to the mortgagors by the respondent on July 11, 1934 (R. 2).

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In order to preserve and protect the respondent's lien and to enjoy the full benefits of the mortgage, it is a legal necessity under the laws of Maryland that the mortgage in question be recorded among the land records of the City of Baltimore as required and directed by the law of Maryland (R. 2).

The petitioner is the duly qualified Clerk of the Superior Court of Baltimore City, and under the provisions of Article 4, Section 38 of the Constitution of Maryland, as Clerk of the Superior Court of Baltimore City, is entrusted with the land records of the City of Baltimore, and it is his duty to receive and record all deeds, mortgages, conveyances, and other papers entitled or required by law to be recorded in the land records of the City of Baltimore (R. 2).

On March 12, 1938, the respondent, through its agent and employee, at the office of the Clerk of the Superior Court of the City of Baltimore during the hours when that office was open for the transaction of business tendered to the petitioner, as Clerk of the Superior Court of Baltimore City, the mortgage executed and delivered to it by Martin J. Burns and Mary Burns (R. 5–8) duly executed and acknowledged, and in all respects ready and eligible for recording under the registration laws of the State of Maryland, together with a fee of $2.50, the lawful charge for recording the mortgage, and requested and demanded that the mortgage be received and recorded among the land records of the City of Baltimore as provided by law (R. 2–3).

The petitioner, as Clerk of the Superior Court of Baltimore City, upon tender of the mortgage for recordation and the usual fee exacted for recording, refused to receive the mortgage for recordation, and refused to record the mortgage unless and until the respondent paid to him for the use of the State of Maryland, in addition to the usual fee for recording, a recording tax of fifty cents, and also unless and until State of Maryland documentary stamps amounting to twenty cents in cost were purchased, affixed to the mortgage, and cancelled (R. 3).

Whereupon the respondent petitioned the Baltimore City Court for a writ of mandamus to compel the petitioner, as Clerk of the Superior Court of Baltimore City, to record the mortgage in issue upon payment of the lawful and usual fee for such service, alleging in the petition (R. 3–4) that it was immune from the Maryland stamp and recording taxes demanded by the petitioner (1) by virtue of the provisions of Section 4 (c) of the Home Owners' Loan Act of 1933, as amended, and (2) as an instrumentality of the United States of America engaged in the functions of the Federal Government, state taxation of which is precluded by constitutional limitation.

The petitioner's demurrer having been overruled with leave to answer, which the petitioner elected not to do, the Baltimore City Court granted the writ of mandamus petitioned for (R. 17–18). The Court of Appeals of Maryland affirmed (R. 18, 23).

SUMMARY OF ARGUMENT

I

A. The Maryland statute taxes mortgages when offered for record. It is immaterial whether it be viewed as a property or excise tax, for the tax immunity or liability of the H. O. L. C. would seem to be the same in any event.

B. Petitioner does not challenge the constitutionality of the Home Owners' Loan Act of 1933, as amended. It follows that the H. O. L. C. shares the full immunity from state taxation which attaches to the operations of the United States. Its functions are necessarily "governmental", since they are in exercise of the delegated powers of the Federal Government. Since it is wholly owned and controlled by the Government, its corporate organization does not affect the governmental nature of its activities. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477.

C. Congress has full power to determine whether the recordation of H. O. L. C. mortgages should be exempt from or to subject to state taxation, and the question of tax immunity or liability is simply one of Congressional intent. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412. Such was the decision in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, where the Court held invalid an Alabama mortgage recordation tax because in conflict with the Congressional exemption of federal farm loan mortgages. That decision is plainly correct.

The laws of the United States are declared by the Constitution to be "the supreme law of the land." If Congress had expressly declared that the recordation of H. O. L. C. mortgages should be exempt from state taxation the Maryland tax would fall, since the provision could not be declared to have no reasonable relationship to the ends promoted by the H. O. L. C.

The doctrine of immunity of federal instrumentalities from state taxation was developed simply as an attribute of the supremacy clause of the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316, 426, 427, 433. Not until *Collector* v. *Day*, 11 Wall. 113, did the Court ascribe immunity to the more nebulous implications of a federated constitution. But even after that decision, and notably in recent Terms, the Court has continued to recognize the historic and specific basis for federal tax immunity. Thus, Congress has an undoubted power to waive the immunity from state taxation which would otherwise attach. In other cases, the Court has recognized the power of Congress to create an immunity for private persons who dealt with the Government and have held the taxpayer liable because Congress had provided no such immunity; correlatively, the Court has extended immunity to such private persons because Congress had declared that they should not be subject to state taxation. With these broad powers as to the tax immunity even of private persons, simply because

they deal with the United States, it follows *a fortiori* that Congress has full power to provide either tax immunity or liability for the property and operations of the Government itself.

The ultimate incidence of a tax cannot ordinarily be determined, with categorical exactness. In the case of the Maryland tax here involved, it is wholly impossible to determine on *a priori* grounds whether the economic burden will ultimately rest upon the H. O. L. C. or upon its borrowers. Even if the tax could precisely be allocated, it is impossible to measure the extent to which the tax upon either the H. O. L. C. or its borrowers is an interference with the governmental functions of the H. O. L. C. in providing credit relief for distressed home owners. The decision of these questions, impossible of exact answer, is committed to Congress and to Congress alone.

The Constitution, in giving to Congress this power, has not placed the states in jeopardy. From the beginning it has been recognized that Congress, by its very nature, represented the interests of the states as well as those of the National Government. *McCulloch* v. *Maryland, supra,* 435–436; *Helvering* v. *Gerhardt,* 304 U. S. 405, 412–413, 416. And in practice, Congress has many times waived an immunity which otherwise would attach to federal instrumentalities; indeed, in the last three Congresses some thirty-two statutes contain such a waiver.

II

The question, therefore, is simply one of Congressional intention.

A. It is necessary to draw a sharp distinction between the tax immunity of private persons and that inhering in the Government itself. We urge that no private person should be exempt from nondiscriminatory taxation simply because he deals with the Government, but that the Government itself should not in the absence of a clear consent be forced to account to the tax collector of a state.

This immunity of the Government is not, we think, adequately explained on the premise that "the power to tax involves the power to destroy." But there are powerful reasons, going beyond the economic burden of the tax, why the Government itself should not be forced into the position of a taxpayer. It would be anomalous for the operations of the United States, buttressed by the supremacy clause, to be subject to a compulsory exaction by an independent sovereign. Practical considerations reinforce the teaching of political science. The delay and accounting burdens, the necessity of opening the Government's books to numerous tax officials, and the burden of numerous and protracted suits, would combine to impose a staggering obstacle to the efficient conduct of the nation's business, which reaches into every taxing jurisdiction in the United States.

It is, we believe, because of these considerations that so marked a contrast appears in the decisions of this Court which deal on the one hand, with the tax immunity of private persons and, on the other hand, with that of the Government itself. The almost bewildering diversity of decision and reasoning in the former category has resulted, we believe, in there being no single decision extending immunity to a private person from a nondiscriminatory tax which can with confidence be said to be good law today. In sharp contrast, every decision of this Court that we have found holds, without a single dissenting vote, that the National Government cannot be subjected to state or local taxation. Each of the decisions, with one exception, has arisen in the silence of Congress. Because of the strong reasons for such an immunity, and because of the unbroken consistency of the decisions of this Court, Congress can be taken to have intended a different rule only when the waiver of immunity is clear. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, dealt with a wholly different situation, the immunity of a private person from taxation simply because he chanced to deal with the Government.

B. Section 4 (c) of the Home Owners' Loan Act of 1933 contains nothing to destroy this normal implication of immunity; on the contrary its language points with compelling force to a Congressional desire for immunity. The statute offers a broad exemption of "the Corporation." This is evi-

dently intended to exempt the H. O. L. C. from all taxes collected from it as a taxpayer. The enumeration of what is *included* in this exemption cannot be thought to mark its limit. The specific exception of real property would be unnecessary unless it were thought otherwise to be exempt. Since a "duly recorded home mortgage" is a statutory essential of the H. O. L. C. operations, it may, in addition, be said that in a very real sense their taxation is a taxation of the H. O. L. C. franchise. Further, the specific enumeration of H. O. L. C. loans, as included in the exemption of "the Corporation," must be supposed to include the mortgage security and recordation required of every loan.

The fragmentary legislative history points to a similar conclusion. Congress in providing immunity for national bank stock held by the R. F. C., after the decision of this Court in *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, was completely explicit as to the Congressional understanding of the scope of the substantially identical exemption intended by the R. F. C. Act, and stated that it was the intention of Congress "to assert the broadest possible immunity from the burden of taxation for the Corporation, its assets, and its operations."

The omission of a specific exemption for mortgages, found in the Federal Farm Loan Act and

relied upon in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, indicates no desire to waive their immunity. The tax exemption of the farm loan mortgages was extended to those held by joint stock land banks, which are not government instrumentalities, and also to those mortgages rediscounted with other private institutions. A specific exemption was, therefore, necessary; the H. O. L. C. mortgages, on the other hand, are held only by the Government itself.

A number of statutes have followed the same general model in providing tax exemption and, in the case of real estate, tax liability. They vary in minor details each from the other; the provisions have only rarely been discussed or considered by Congress. We think it fair to say that every exemption clause, whatever its precise phrasing, was intended to serve merely as an unnecessary notice that the customary tax exemption of the Government would attach.

ARGUMENT

I

THE IMMUNITY OR LIABILITY OF THE H. O. L. C. TO THIS TAX IS A QUESTION OF CONGRESSIONAL INTENT

A. *Nature of the Maryland Tax*

Section 6 of Chapter 277 of the Maryland Acts of 1939 (Appendix, *infra*, pp. 66–67), amends Sections

213 and 214 of Article 81 of the Annotated Code to read, in part:[1]

> 213. A tax is hereby imposed upon every instrument of writing conveying title to real or personal property, or creating liens or incumbrances upon real or personal property, offered for record and recorded * * *. The term "instruments of writing" shall include * * * mortgages * * *.
>
> In the case of instruments conveying title to property, the tax shall be at the rate of 10c for each $100 of the actual consideration paid or to be paid; in the case of instruments securing a debt, the tax shall be at the rate of 10c for each $100 of the principal amount of the debt secured. In addition to the tax imposed, the Clerks shall collect a charge of 50c for each instrument offered for record and recorded, upon which a tax is payable hereunder.
>
> * * * * *
>
> 214. No instrument subject to the tax imposed by this sub-title shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. * * *

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[1] The case arose and was decided in the state courts under Section 4 of Chapter 11 of the Laws of the Maryland Special Session of 1937, *infra*, which added Sections 213 and 214 to the Code. The tax imposed by the 1937 Act was to expire on September 30, 1939. So far as relevant to this proceeding, there is no material difference between the 1937 and 1939 taxes. Section 25 of the 1939 law provides that its provisions "so far as they are substantially the same as existing statutes, shall be construed as continuations thereof".

> It shall be unlawful for any person to record any instrument subject to the tax imposed by this subtitle, or to incur any additional debt secured by an instrument previously recorded, with respect to which additional debt a tax is required to be paid, without having provided for the payment of the tax and recordation charge * * *.

The language of the statute[2] shows that it is imposed *on* the mortgage, *when* it is offered for record. This Court, in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 378, construed a substantially similar Alabama statute[3] as "a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it." It is immaterial whether this be the correct view, or whether a more refined analysis would describe the tax as a combined property tax and excise.[4] For the tax immunity or liability of the H. O. L. C. would reach indifferently, so far as we can see, to its property or to its lending operations.

The Maryland tax raises one other issue of terminology. Petitioner suggests that tax is not im-

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[2] The statute appears not to have been construed by the Maryland courts, or considered in any case other than the present.

[3] "No mortgage * * * which is given to secure the payment of any debt * * * shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record * * *." Alabama Acts of 1929, No. 328, p. 420.

[4] Compare *Pocohontas Collieries Co.* v. *Commonwealth*, 113 Va. 108, 112, describing a similar tax as a privilege tax.

posed on the H. O. L. C. but on private persons. This suggestion is based in part on the erroneous ground (Br. 34–36, 44) that the borrower rather than the H. O. L. C. meets the burden of the tax; this analysis is shown to be faulty at a later point (*infra*, pp. 17–26). The suggestion is also based in part on the opinion of the Attorney General of Maryland (Pet. Br. 67) that it is immaterial under the Act who supplies the funds for payment of the tax (Br. 6, 22–23). This feature, however, is not a peculiarity of the present statute; we know of no tax collector who has ever refused payment of a tax because tendered by one who might not be the taxpayer. More significantly, even though the mortgagee is not specifically named as the taxpayer, the recordation is solely for the protection of the H. O. L. C. and "whoever pays it it is a tax upon the mortgage." *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 378. The Home Owners' Loan Act of 1933 requires that each loan be secured "by a duly recorded home mortgage" (*infra*, p. 53), and under the mechanics of the H. O. L. C. loan transaction it is forced to pay the recordation expenses in the first instance (*infra*, pp. 27–29). The tax must, therefore, be taken to be one which is applied to the H. O. L. C.

B. *The H. O. L. C. Has the Immunity of the United States*

Petitioner does not challenge the constitutionality of the Home Owners' Loan Act of 1933, as amended (Br. 12). The Court will, therefore,

"assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *cf. Kay* v. *United States*, 303 U. S. 1.

It follows that the H. O. L. C. shares the full immunity from state taxation which attaches to the operations of the United States. It is settled that the activities of the United States can never be characterized as "proprietary" rather than "governmental." The Federal Government exercises only delegated powers, so "its every action within its constitutional power is governmental action." *Graves* v. *New York ex rel. O'Keefe, supra*, p. 477. This, too, petitioner concedes and relies on the nature of the H. O. L. C. activities only to demonstrate the supposed threat to state revenues (Br. 36–43).

It is also immaterial that the H. O. L. C. was created as a corporation rather than as a branch of one of the regular departments. The National Government itself is acting through a corporation which it owns and controls. "This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account." *Clallam County* v. *United States*, 263 U. S. 341, 345. Therefore its "activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments." *Graves* v. *New York ex rel. O'Keefe, supra*, p. 477.

C. *Congress Has Full Power to Exempt From or to Subject to State Taxation the Recordation of H. O. L. C. Mortgages*

The H. O. L. C. tendered the petitioner the mortgage recordation fee of $2.50 when it offered the mortgage for recordation; it refused to pay the additional excise tax of 50 cents on the mortgage offered for recordation or to purchase documentary excise stamps in the amount of 20 cents. These taxes, imposed at the time under Section 4 of c. 11 of the Laws of the 1937 Special Session, *infra*, and now under Section 6 of c. 277 of the Acts of 1939, *infra*, are conceded by petitioner to be revenue taxes and not service charges for recording (Pet. 5; Br. 10–12). This case, therefore, presents no issue as to any immunity which the Federal Government might have with respect to compensatory fees for the use of facilities supplied by the state, nor does it raise any question as to a charge which, nominally a compensatory fee, in fact provides revenues in excess of the cost of the service. The issue is simply the power of the state to tax a mortgage owned and offered for record by the Federal Government.

There is, we think, no doubt as to the power of Congress to resolve this issue by enacting either that the recordation of H. O. L. C. mortgages should be subject to or should be free of state and local taxation. The question thus is simply one of Congressional intent. *Helvering* v. *Gerhardt*, 304 U. S. 405, 411–412n. We shall first show that this

conclusion is compelled both by authority and by principle. Since there will be little question of the power of Congress to waive immunity, the discussion will be directed chiefly to the power of Congress to assert the immunity. Point II of this brief will discuss the question of whether Congress in fact intended such an exemption.

1. *The Court Has Settled the Question.*—The Court considered an Alabama statute which, in addition to the recording fee, imposed a tax upon the privilege of recordation in *Federal Land Bank v. Crosland,* 261 U. S. 374. It held the tax invalid as applied to a mortgage offered for record by a Federal Land Bank, because the Federal Farm Loan Act (Sec. 26, c. 245, 39 Stat. 360) declared that mortgages executed to Federal Land Banks should be tax exempt. Mr. Justice Holmes, writing for a unanimous Court, said (p. 378) that the state—

> has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that if is not at liberty to reach.

We do not urge that the *Crosland* case settles all of the issues in this case, but it seems plain enough that it settles the *power* of Congress to exempt the recordation of H. O. L. C. mortgages.[5] The au-

[5] Petitioner's concession (Pet. 12; Br. 16) is even broader, and concedes that if the *Crosland* case is binding the deci-

thority of the *Crosland* case, in striking contrast to the decisions which have extended immunity from a nondiscriminatory tax to private persons, has been impaired by no other decision of this Court. In no case has it been held or suggested that the United States in the absence of consent is liable to taxation by the states.

Our case, however, does not rest upon authority alone. The nature of our federated system, the clear implication of most of the decisions of this Court and the practical reasons for tax exemption unite to show that Congress has full power to provide or to waive tax immunity for the operations of the United States.

2. *The Constitutional Basis.*—Article VI of the Constitution provides that "the laws of the United States" made in pursuance of the Constitution "shall be the supreme law of the land." If, then, Congress had expressly declared that the H. O. L. C. mortgages should be free of state taxation, the Maryland tax would fall unless it could be shown that the federal statute was unconstitutional. Such a statutory exemption could be declared invalid only on the ground that it had no relation to the governmental purposes of the H. O. L. C.,[6] and so was neither a necessary nor a

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sion below is correct. The Government's brief in opposition (pp. 6, 12) seems also to have taken an unduly broad view of the *Crosland* holding.

[6] As set out at length in the brief for the respondent in *Kay v. United States*, No. 61, October Term, 1937, pp.

proper means toward the ends promoted by the H. O. L. C.[7] But, so long as there is a reasonable relationship between the legislation and the end which it is designed to promote, the courts have no power to reexamine the Congressional decision that the statute is necessary and proper. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Logan* v. *United States*, 144 U. S. 263, 283; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 473–474. It is difficult to believe that a provision for tax exemption of the mortgages and operations of the H. O. L. C. could be held to have no reasonable relation to the Congressional purpose of providing relief for distressed home owners.

Petitioner urges that the gain to the Federal Government, or the aid to the purposes served by the H. O. L. C., is less vital to the national well-

64–102, the H. O. L. C. activities are an exercise of the fiscal and general welfare powers granted to Congress.

[7] It might possibly be urged that the exemption was unconstitutional under the Tenth Amendment, as an invasion of the reserved powers of the states. The Government, at each of the last two Terms, has offered an extended analysis of that Amendment in opposition to contentions of invalidity based on the reserved powers of the states. *United States* v. *Bekins*, No. 757, October Term, 1937 (Br. 48–66); *Mulford* v. *Smith*, No. 505, October Term, 1938 (Br. 120–138). While the Court did not in either case undertake to resolve the issue, it seems unnecessary again to repeat the argument that the Tenth Amendment cannot restrict the scope of federal powers. For we know of no instance in which it has even been argued that federal tax immunity violates the Tenth Amendment.

being than are the meritorious uses of the revenues from the state tax (Br. 12, 42). But such an inquiry would be academic, for under the Constitution the choice of conflicting ends is for Congress, not the Maryland legislature. It was urged in the Social Security cases that the expenditures were likely to be contrary to state policy. The Court, in *Helvering* v. *Davis*, 301 U. S. 619, 645, replied:

> The issue is a closed one. It was fought out long ago. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. Constitution, Art. VI, Par. 2.

3. *The Decisions of this Court.*—The doctrine of intergovernmental tax immunity has its historic basis in the supremacy clause of the Constitution; throughout the winding course of tax immunity litigation, Article VI of the Constitution has measurably shaped the results of a number of cases; and in recent terms the Court has once more recognized the force of the supremacy clause in this field. To the extent that immunity from state taxation is a product of federal supremacy, there is no room for argument as to the power of Congress to provide exemption.

The state taxes in the early cases fell, not before an express Congressional provision of immunity, but before an implied conflict with the federal stat-

utes authorizing the taxed activity. The Court in *McCulloch* v. *Maryland, supra,* placed its decision squarely on the "great principle" that "the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them" (p. 426). The opinion never deviates from the simple proposition that the states cannot tax federal instrumentalities because the Constitution declares the federal law, under which the instrumentality is created, to be supreme over the laws of the states. Thus, Chief Justice Marshall said (pp. 427, 433):

> It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.
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> * * * * *
>
> The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the succeeding fifty years the Court seven times held a state tax invalid as applied to transactions of or affecting the United States; each decision was squarely placed on the ground of the con-

stitutional supremacy of the Federal Government.[8]

In *Collector* v. *Day*, 11 Wall. 113, these cases were wrenched into a pattern which was intended to protect state activities equally with those of the National Government.[9] But even after the decision in *Collector* v. *Day* the Court did not wholly lose sight of the traditional basis of tax immunity, or consistently ignore the specific constitutional basis for immunity found in Article VI in favor of a nebulous concept based only upon the implications latent in a federated system. Numerous cases have recognized that the doctrine of immunity is

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[8] *Osborn* v. *United States Bank*, 9 Wheat. 738, 868; *Weston* v. *City Council of Charleston*, 2 Pet. 449, 466–468; *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, 447–450; *Bank of Commerce* v. *New York City*, 2 Black 620, 632–634; *Bank Tax Case*, 2 Wall. 200; *The Banks* v. *The Mayor*, 7 Wall. 16, 25; *Bank* v. *Supervisors*, 7 Wall. 26.

Story entertained no doubt but that Congress could tax state instrumentalities although the states could not tax federal instrumentalities. Story, *Constitution*, I, Sec. 1053.

[9] None would quarrel with the decision so far as it expresses the principle that the doctrine of tax immunity ensures "the necessary protection of the independence of the national and state governments within their respective spheres under our constitutional system" (*Helvering* v. *Powers*, 293 U. S. 214, 225). But this by no means is the equivalent of saying that a particular type of tax must necessarily and automatically be given the same treatment without consideration of whether it be imposed by the federal or by a state government. This distinction is developed in more detail in our brief (pp. 26–36) as *amicus curiae* in *Graves* v. *New York ex rel. O'Keefe*, No. 478, October Term, 1938.

grounded at least in part on the supremacy clause.[19] And, in recent decisions, the Court has again explicitly recognized that one, if not the chief, basis for federal tax immunity is the supremacy clause of the Constitution. Thus, a footnote to the opinion in *Helvering* v. *Gerhardt*, 304 U. S. 405, 411, expanding the inferences of the text (pp. 411, 412) reads:

> Since the acts of Congress within its constitutional power are supreme, the validity of state taxation of federal instrumentalities must depend (a) on the power of Congress to create the instrumentality and (b) its intent to protect it from state taxation.

And in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 478, the Court repeated this thought—

> the federal government is one of delegated powers in the exercise of which Congress is supreme; * * *. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation.

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[19] *Missouri* v. *Gehner*, 281 U. S. 313, 321; *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 221; *Long* v. *Rockwood*, 277 U. S. 142, 147; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 613; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 117; *Farmers Bank* v. *Minnesota*, 232 U. S. 516, 521; *South Carolina* v. *United States*, 199 U. S. 437, 451–452; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41.

The decisions amply bear out the inference to be drawn from these statements of principle, and show that the immunity of federal instrumentalities and transactions from state taxation turns upon the action of Congress, or the implications to be drawn from its silence.[11]

Thus Congress has an undoubted power to waive the immunity from state taxation which would otherwise attach to federal instrumentalities and transactions. *Van Allen* v. *The Assessors,* 3 Wall. 573, 583, 585; *People* v. *Weaver,* 100 U. S. 539, 543; *Mercantile Bank* v. *New York,* 121 U. S. 138, 154; *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, 668; *Mid-Northern Oil Co.* v. *Montana,* 268 U. S. 45; *Oklahoma* v. *Barnsdall Corp.,* 296 U. S. 521, 525–526; *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209; *British-American Co.* v. *Board,* 299 U. S. 159.

Still other cases have expressly recognized the power of Congress to create a tax immunity for persons who dealt with the Government and have held the taxpayer liable because Congress had provided no immunity. *James* v. *Dravo Contracting Co.,*

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[11] The Court in *Graves* v. *New York ex rel. O'Keefe, supra,* 478–479, it is true, said:

"Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have implied, is a question which need not now be determined."

This caution seems to have been dictated more by the fact that the issue was not presented in that case than by the requirements of constitutional theory or the decided cases.

302 U. S. 134, 161; *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 23; *Trotter* v. *Tennessee*, 290 U. S. 354; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127, 129; *Shaw* v. *Oil Corporation*, 276 U. S. 575, 578–579; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 323; *Goudy* v. *Meath*, 203 U. S. 146, 149–150; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 121, 125; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 589, 592.

Again, in other cases the Court has extended immunity from state taxation only, or in part, because Congress had so provided. *Lawrence* v. *Shaw*, 300 U. S. 245; *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 212–213; *Bank* v. *Supervisors*, 7 Wall. 26, 30–31; see Justices Brandeis and Stone, concurring in *Miller* v. *Milwaukee*, 272 U. S. 713, 716.

In none of these decisions which recognize that immunity from state taxation is a matter of Congressional intention was the taxpayer the Government itself. In each case the taxpayer was a private person who dealt with the United States, or was "a corporation having its own purposes as well as those of the United States and interested in profit on its own account" (*Clallam County* v. *United States*, 263 U. S. 341, 345). The power of Congress to create an immunity for these private taxpayers applies *a fortiori*, and in greatly intensified form, when the immunity is created for the H. O. L. C., a part of the Government itself.

4. *The Practical Necessities of Government.*—The effect of a tax upon the operations of government cannot ordinarily be determined with categorical exactness. This Court, dealing with taxes upon private persons, has frequently recognized the difficulty of gauging the economic incidence of those taxes upon the government with which the taxpayer deals. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 484–485; *Helvering* v. *Gerhardt*, 304 U. S. 405, 420–421; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 159–160. By the same token, the economic effects and practical interference of a tax laid upon the Government itself cannot be measured by *a priori* standards.

This is well illustrated by the case at bar. The Maryland tax is upon mortgages and deeds offered for record. Its economic burden appears likely to come to rest, either upon the H. O. L. C. or the borrower, according to a number of variable factors.[12] (1) In the case of a first mortgage offered for record by the H. O. L. C., the tax will be paid in the first instance by the H. O. L. C.[13] and the amount of the tax added to the indebtedness of the

[12] The information and speculation in this paragraph is drawn from letters to the Acting Solicitor General from Harold Lee, Esq., General Counsel of the H. O. L. C., dated August 8, 1939, and August 23, 1939.

[13] Its General Counsel states that the H. O. L. C. has made efforts to have the other party to the transaction pay the tax but that this is ordinarily accomplished only when the instrument is a deed from the H. O. L. C. to a purchaser.

mortgagor; (a) if the loan is repaid, the ultimate burden of the tax will rest on the borrower, while (b) if there is default, the H. O. L. C. will not be reimbursed for the amount of the tax, unless (c) the property acquired under the mortgage is sold for an amount sufficient to cover the debt, expenses, and the tax. (2) In the case of deeds in foreclosure proceedings or from mortgagors in lieu of foreclosure, the H. O. L. C. will pay the tax in the first instance and will recoup this expense only if the property is subsequently sold for a sufficient amount. (3) In the case of deeds of property from the H. O. L. C. to purchasers, the tax, in Maryland, will be paid equally by the purchaser and the H. O. L. C.[16] If the purchaser calculates with sufficient precision, it is possible that his offer to the H. O. L. C. will be correspondingly reduced.

Petitioner, it may be noted, does not agree with this analysis, and states that the amount of the tax is in practice paid by the borrower (Br. 34–36, 44). We agree that, as a general rule, the private mortgagee will require the borrower to pay the recordation expenses or will deduct their amount from the loan. But the H. O. L. C. loans are rehabilitation loans, not loans made for profit. There is no occasion to put pressure on the borrower to force him to pay all the costs of the transaction. Indeed, the mechanics of the transaction preclude payment by the borrower. The H. O. L. C. does not advance

[16] This is in response to a local custom in real-estate transactions.

cash to its borrowers; the amount of the mortgage loans, when the H. O. L. C. was making them, was paid directly to the old mortgagees, ordinarily in H. O. L. C. bonds (except for balances under $25), and the amount of the reconditioning loans is paid directly to the contractors. Thus, the borrower never receives cash and, we are assured by the H. O. L. C., does not pay recordation expenses. In any event, the allegations of the petition for writ of mandamus, admitted by the present petitioner's demurrer, are clear that the tax was demanded of the H. O. L. C. itself (R. 3). The tax, therefore, is paid in the first instance by the H. O. L. C. and its recoupment is postponed until the loan is repaid or otherwise closed without loss.

It is thus nearly impossible to estimate even the immediate incidence of the tax. It would be necessary to chart both the probability of repayment by Maryland borrowers from the H. O. L. C. and the future course of real estate values in the state. If the analysis were to be more refined, it would be necessary to venture still further into the realm of economic speculation, and to consider the effect of the tax on the value of Maryland real estate and economic activity generally.

Again, even if it be supposed that a precise allocation of the incidence of the tax were somehow accomplished, the degree of interference with the operations of the H. O. L. C. would remain wholly incapable of precise estimate. The Home Owners' Loan Act of 1933 was designed to offer emergency

relief for urban home owners who, because of a calamitous economic crisis, stood in danger of losing their homes. By permitting refinancing on easier terms for over a million borrowers,[15] the H. O. L. C. made a tremendous contribution to the general welfare of the United States.[16] If, for example, it were estimated that the H. O. L. C. would bear 25 percent of the ultimate tax burden and the borrowers 75 percent, it would still be impossible to estimate the degree of interference with the operations of the H. O. L. C. The very purpose of the Act was to provide relief for home mortgagors. None can say the extent to which imposing an added tax burden on the transaction through which relief was offered would be an interference with the federal purpose.[17] Certainly it is arguable that the interference would be fully as great as in the cases where the economic burden was supposed to fall entirely on the H. O. L. C. itself.

It would, we believe, be impossible to gather a faculty of economists who could provide wholly

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[15] *Final Summary of Financing Operations*, H. O. L. C., Dec. 4, 1936.

[16] See *First Federal Savings & Loan Association* v. *Loomis*, 97 F. (2d) 831, 839, 840 (C. C. A. 7th), certiorari dismissed, on motion of petitioners, *Martin* v. *First Federal Savings & Loan Association*, 305 U. S. 666.

[17] Senator Hollis, in charge of the comparable Federal Farm Loan bill, said that the purpose of the exemption for mortgages executed to the federal and joint stock land banks was to aid the borrowing farmer. 53 Cong. Record, Part 7, p. 6851.

satisfactory answers to these questions. However that may be, under the Constitution, Congress, and Congress alone, has the power finally to make the choice. If Congress had undertaken expressly to provide either a rule of immunity or of taxability for the H. O. L. C. recordation transaction, it is unthinkable that this Court should say, in a field so beset by doubt and speculation, that the decision of Congress was arbitrary, or had no reasonable relation to the purpose sought to be accomplished.

It is to be noted that this is the converse of the problem presented with respect to the conjectural incidence of taxes imposed in the first instance on private persons. In each case the ultimate burden of the tax "depends upon considerations so various and complex as to preclude the assumption *a priori* that any particular tax at any particular time is passed on." Justices Stone and Brandeis, dissenting in *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 581. For that reason we urge that it requires an express declaration by Congress either to exempt a private person from taxation or to waive the immunity of the Government itself.

In committing the decision of these questions to Congress, the Constitution has not, as petitioner fears, placed the revenues of the states in jeopardy (Br. 11–12, 37, 41). From the beginning it has been recognized that Congress, by its very nature, could be trusted to represent the interest not only of the National Government but of the states as well.

Chief Justice Marshall, in *McCulloch* v. *Maryland*, *supra*, pp. 435–436, said:

> The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control.

The Court in *Helvering* v. *Gerhardt*, 304 U. S. 405, quoted this extract from *McCulloch* v. *Maryland*, and, in the light of 120 years of constitutional history, reaffirmed and amplified the reasoning of Chief Justice Marshall.[18] It said (p. 416)—

> the people of all the states have created the national government and are represented in Congress. Through that representation they exercise the national taxing power. The

[18] In a sense the discussion was dictum, for the Court said (p. 415):

"We need not stop to inquire how far, as indicated in *McCulloch* v. *Maryland*, *supra*, the immunity of federal instrumentalities from state taxation rests on a different basis from that of state instrumentalities; or whether or to what degree it is more extensive. As to those questions, other considerations may be controlling which are not pertinent here. * * *"

> very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse through the possibility of resort to the usual processes of political action which provides a readier and more adaptable means than any which courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other.

At another point the Court again developed this thought.[19] And in *Graves* v. *New York ex rel. O'Keefe, supra*, p. 478, the Court referred to this discussion in the *Gerhardt* case with at least guarded approval.

The practical truth of this principle has abundantly been demonstrated in the history of our federation. We know of no instance in which a state has ever waived its own immunity, or that of its instrumentality, from federal taxation. But, as

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[19] * * * Chief Justice Marshall, * * * was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation: and in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality (304 U. S. at 412).

this Court has noted, the Congress has many times waived an immunity which otherwise, under existing decisions, would have attached to federal instrumentalities. *Helvering* v. *Gerhardt, supra,* p. 417; *Graves* v. *New York ex rel. O'Keefe, supra,* p. 478. Compare *Howard* v. *Gipsy Oil Co.,* 247 U. S. 503, and *Large Oil Co.* v. *Howard,* 248 U. S. 549, with *Oklahoma* v. *Barnsdall Corp.,* 296 U. S. 521, 522-523; *Gillespie* v. *Oklahoma,* 257 U. S. 501, with *British-American Co.* v. *Board,* 299 U. S. 159, 161, 166. More specifically to indicate the frequency with which Congress waives tax immunity, there are gathered in the margin thirty-two Acts by which the Congress, in the course of only three Congresses (the 73d to 75th), has waived the immunity of its instrumentalities in whole or in part.[20]

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[20] Real estate is frequently subjected to nondiscriminatory state taxation. Act of June 13, 1933, c. 64, 48 Stat. 130; Act of June 16, 1933, c. 89, 48 Stat. 177; Act of June 16, 1933, c. 98, 48 Stat. 267; Act of January 31, 1934, c. 7, 48 Stat. 347; Act of April 27, 1934, c. 168, 48 Stat. 644; Act of June 27, 1934, c. 847, 48 Stat. 1252, 1255, 1257; Act of August 23, 1935, c. 614, 49 Stat. 700; Act of July 22, 1937, c. 517, 50 Stat. 531; Act of December 6, 1937, c. 3, 51 Stat. 4; Act of February 3, 1938, c. 13, Sec. 4, 52 Stat. 22; Act of February 3, 1938, c. 13, Sec. 8, 52 Stat. 24; Act of March 8, 1938, c. 44, Sec. 5, 52 Stat. 108. Personal property likewise is frequently subjected to nondiscriminatory state taxation as are also shares of stock in government instrumentalities when owned by private individuals. Act of June 16, 1933, c. 98, 48 Stat. 267; Act of June 26, 1934, c. 750, 48 Stat. 1222; Act of July 22, 1937, c. 517, 50 Stat. 531; Act of December 6, 1937, c. 3, 51 Stat. 4. In numerous instances government instrumentali-

Petitioner challenges the view that Congress has power to widen the limits of federal tax exemption from those prescribed by the Constitution; this is on the ground that if the tax interferes with the federal function it is invalid under the Constitution and, if it does not, the provision for exemption is not a law which is necessary or proper to attain the governmental ends (Br. 48–50). The dilemma is logically flawless, but rests upon an entirely false premise. The incidence and interference of a tax are not facts which exist or do not, but are invariably questions of degree and of doubt. The legislative branch of the Government was created by the Constitution to resolve just such questions as these.

It seems clear, therefore, that the settled principles of constitutional doctrine, giving Congress full power to determine whether federal property

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ties are subjected to limited state taxation or to state taxation to the same extent as similar state institutions or instrumentalities. Act of June 13, 1933, c. 64, 48 Stat. 133; Act of June 18, 1934, c. 585, 48 Stat. 993; Act of June 26, 1934, c. 750, 48 Stat. 1222; Act of June 27, 1934, c. 847, 48 Stat. 1249, 1255; Act of March 12, 1936, c. 138, 49 Stat. 1160; Act of April 17, 1937, c. 108, 50 Stat. 68; Act of August 25, 1937, c. 772, 50 Stat. 806. In still other instances the United States or its instrumentalities are authorized to pay certain amounts to the States or local taxing units in lieu of taxes. Act of May 18, 1933, c. 32, 48 Stat. 66, Act of April 13, 1934, c. 116, 48 Stat. 577; Act of June 29, 1936, c. 860, 49 Stat. 2026; Act of June 29, 1936, c. 868, 49 Stat. 2036; Act of May 28, 1937, c. 277, 50 Stat. 221; Act of July 22, 1937, c. 517, 50 Stat. 531; Act of August 9, 1937, c. 570, 50 Stat. 570; Act of August 28, 1937, c. 876, 50 Stat. 876; Act of September 1, 1937, c. 896, 50 Stat. 895.

and transactions should be exempt from or subject to state taxation, do not endanger the states but are in truth required by the practical necessities of a federated government. The question, both on authority and on reason, is simply whether Congress intended immunity or taxability.

II

CONGRESS INTENDED TO EXEMPT THE RECORDATION OF H. O. L. C. MORTGAGES FROM STATE TAXATION

Congress, then, has full power to exempt the recordation of H. O. L. C. mortgages from state taxation or to subject them to such taxation. It has, however, made no express provision as to the tax status of H. O. L. C. mortgage recordation. There arises, therefore, the further question as to the interpretation of the Home Owners' Loan Act of 1933: what in truth did Congress intend?

The two courts which have considered the question have each held the H. O. L. C. to be exempt from taxation on its mortgages offered for record. This was the decision in the instant case and in *Home Owners' Loan Corporation* v. *Anderson*, 145 Kan. 209. The two state attorneys general who have rendered formal opinions have similarly ruled, 1935–1936 Op. Pa. A. G. 55; Rhode Island (Apr. 23, 1936). See, also, *Federal Land Bank* v. *Hubard*, 163 Va. 860. These cases and rulings, we submit, have reflected the intention of Congress.

We shall show, first, that tax immunity would have been the necessary conclusion if Congress had been wholly silent as to H. O. L. C. tax exemption;

then we shall show that this normal implication is confirmed rather than contradicted by the provisions which in fact are found in Section 4 (c) of the Act.

A. *The Silence of Congress Implies an Immunity From State Taxation for the Operations of the United States*

1. *The Distinction Between Private Taxpayers and the Government.*—It is necessary at the outset to draw a sharp distinction between the tax immunity to be accorded private taxpayers who chance to deal with the Government and that inhering in the Government itself, including, of course, its instrumentalities which are a part of the governmental structure (*Clallam County* v. *United States*, 263 U. S. 341). We urge that no private person should be exempt from nondiscriminatory taxation merely because his transaction is with the government of a state or the nation.[21] But we think that the United States itself should not in the absence of a clear consent be forced to account to the tax collector of a state.

When this distinction is made clear, much of the differences between petitioner and the Government evaporate. With much, if not most, of petitioner's

[21] This generalization, as with most legal principles, is subject to qualification or exception. Taxes of a character not now known to us might present an actual interference with the operations of government; or Congress might choose to alter the normal inference to be drawn from its silence.

able and candid brief we are in complete agreement. Thus, we agree wholly that any nondiscriminatory tax should be valid (Br. 18–23); we urge only that the principle should, as are the cases on which petitioner relies, be limited to taxes laid on private persons. We agree, but subject to the same limitation, that no immunity should be granted from taxes the economic burden or governmental interference of which is conjectural (Br. 34–36). We agree that the recent decisions of this Court have served to make sweeping and wise modifications in the law of intergovernmental tax immunity (Br. 16, 29–33); we insist, however, that these decisions are confined to private taxpayers who deal with the Government.

The immunity of the Government itself from a nondiscriminatory tax is not, we think, adequately explained on the premise that "the power to tax involves the power to destroy."[22] Representative government has, throughout the history of the Nation, proved an adequate guarantee against oppressive taxation. Payment of a tax, which neither in terms nor in fact marks the Government transaction as the object of the levy, will not bring the op-

[22] See Justices Holmes, Brandeis, and Stone, dissenting in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223; Justices Holmes, Brandeis, Sutherland, and Stone, dissenting in *Long* v. *Rockwood*, 277 U. S. 142, 150; Mr. Justice Frankfurter, concurring in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 489–490.

erations of the Government to a halt. For this reason the United States as *amicus curiae* urged in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, that a gross-receipts tax upon the federal contractor should be sustained, even though the full amount of the tax burden would ordinarily be passed on to the Federal Government.

But there are powerful reasons, going beyond the economic burden of the tax, why the Government itself should not be subject to state taxation unless it has plainly accepted that burden. These reasons are found both in political philosophy and in practical government. None is applicable to the case of the private taxpayer who deals with the government.

It is unnecessary to dwell on the anomalous philosophic nature of a tax imposed on an independent sovereign. A tax is a compulsory exaction by the sovereign from its subject.[23] Whatever the view one accepts of the nature of government, whether as the source of ultimate force or as the result of a social compact, it is plain that there is no philosophic basis for the power by unilateral action to wrest taxes from another sovereign government. It may be argued that the supremacy clause of the

[23] See *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 279; *United States* v. *LaFranca*, 282 U. S. 568, 572; *Houck* v. *Little River District*, 239 U. S. 254, 265; *Florida Central R. Co.* v. *Reynolds*, 183 U. S. 471, 475; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 197–198.

Federal Constitution so bulwarks the federal taxing power that it reaches to the states themselves. But this argument would defeat rather than aid any contention that the states could tax the United States.

The principles of political science are reinforced by urgent practical considerations. If, to the manifold duties of each federal department and agency, there were added the burden of preparing numerous tax returns in each of 48 or more separate taxing jurisdictions, it is not difficult to see that the governmental functions would be appreciably impeded. Apart from the accounting burden, the local tax collectors might be content to accept the government's return or they might, on the other hand, be sufficiently conscientious or antagonistic to demand the production of the government's books. Even to permit an intelligent inspection by numerous state officials would produce a heavy and often repeated burden on the agency's staff. In the inevitable event of disputes as to the amount of liability, the Government would be faced with numerous and protracted suits. The usual delays and negotiations would be prolonged if local tax assessors abandoned any general leniency in assessment because of the vast resources of the Federal Treasury. Since its operations reach into every taxing jurisdiction in the United States, the Federal Government would be faced with a staggering obstacle to the efficient conduct of the nation's

business if it were thought subject to the jurisdiction of every state and local tax collector.[24]

2. *The Decisions of this Court.*—The rules of intergovernmental tax immunity, so far as they have been developed and applied to private persons who deal with the government, exhibit an almost bewildering diversity of decision and reasoning. A number of cases have expressly been overruled;[25] many more have been distinguished on the narrow-

[24] The only arguable exception which we know to an unbroken practice of exemption is found in the procedure followed in purchasing land in the name of the United States. Attorney General Garland, in 18 Op. A. G. 491 (1887), advised the Secretary of War to pay a recordation tax, in addition to the recordation fee, imposed by Virginia on deeds offered for record. The reasoning of the opinion, to the effect that recordation is a privilege offered by the State which the Government may accept or not as it chooses, is contradicted by the decision of this Court in *Federal Land Bank* v. *Crosland*, 261 U. S. 374. But, perhaps in consequence of this opinion, the practice has developed by which the United States makes payment for land purchased only after the vendor has himself placed the deed on record and satisfied all taxes. Under this practice, it will be observed, the taxpayer is not the Government but the private land owner.

[25] *Long* v. *Rockwood*, 277 U. S. 142, overruled by *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *Collector* v. *Day*, 11 Wall. 113; and *N. Y. ex rel. Rogers* v. *Graves*, 299 U. S. 401, overruled in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; compare *Evans* v. *Gore*, 253 U. S. 245 and *Miles* v. *Graham*, 268 U. S. 501, apparently overruled by *O'Malley* v. *Woodrough*, 307 U. S. 277.

est of grounds;[26] and in still other decisions technical rules have been devised to reach results in practical contradiction of earlier cases.[27] In short, there is no single decision exempting a private taxpayer from a nondiscriminatory tax which can with confidence be said to be good law today.

Measured against the fluctuating doctrines and the contrariety of results reached in the cases of taxes directed at private persons who deal with the government, the decisions relating to a tax on

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[26] Compare, e. g.: (1) *Brush* v. *Commissioner*, 300 U. S. 352, with *Helvering* v. *Gerhardt*, 304 U. S. 405; (2) *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, with *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; (3) *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570; and *Graves* v. *Texas Co.*, 298 U. S. 393, with *Alward* v. *Johnson*, 282 U. S. 509; *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572; and *James* v. *Draco Contracting Co.*, 302 U. S. 134; (4) *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, with *Pacific Co.* v. *Johnson*, 285 U. S. 480.

[27] Compare, e. g.: (1) *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, with *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (and see Justices Brandeis, Holmes and Stone dissenting in *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 527); (2) *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, with *Liggett & Myers Co.* v. *United States*, 299 U. S. 383; (3) *Telegraph Co.* v. *Texas*, 105 U. S. 460, and *Williams* v. *Talladega*, 226 U. S. 404, with *James* v. *Draco Contracting Co.*, 302 U. S. 134; (4) *Bank of Commerce* v. *New York City*, 2 Black 620, and *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, with *Society for Savings* v. *Coite*, 6 Wall. 594; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103; and *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506.

the United States itself show an extraordinary uniformity. No decision of this Court has ever held, in the absence of legislative consent, that the national government could be taxed by a state or local government. No Justice of this Court has dissented from this result in any case which we have found.[25]

Of these cases, only one, *Federal Land Bank* v. *Crosland*, 261 U. S. 374, arose under a statute which expressly declared the transaction exempt. Each of the other cases recognized that immunity must be the result in the silence of Congress. The opinions speak, generally, of a "constitutional" immunity from taxation. But in view of the undoubted power of Congress to waive the immunity of the United States or to declare an exemption which would not otherwise be granted (see *supra*, pp. 17–26), the immunity from state taxation seems much more properly to be viewed as an interpretation of the Act of Congress under which the transaction occurred.

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[25] Two cases were affirmed by an equally divided Court at the December Term, 1849. Their facts are reported in *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 175–177. One, *United States* v. *Portland*, resulted in the dismissal of a suit by the United States to recover taxes paid on a customs building; the other, *Roach* v. *Philadelphia County*, affirmed a decision that the United States was liable to local taxation on the U. S. Mint. These inexplicable decisions, as pointed out in the *Van Brocklin* case, have no weight as authority.

Since the Second Bank of the United States had a preponderantly private stock ownership,[29] it probably would be viewed at this day as a private corporation having its own purposes as well as those of the United States (*Clallam County* v. *United States*, 263 U. S. 341), rather than the Government itself. But the Court's approach then seems to have been to view the bank as a part of the Government. In any event, the Court in *McCulloch* v. *Maryland*, 4 Wheat. 316, and *Osborn* v. *United States Bank*, 9 Wheat. 738, held the bank to be immune from discriminatory taxation upon its transactions. In *United States* v. *Railroad Company*, 17 Wall. 322, the Court held invalid a federal tax on interest payments to the City of Baltimore.[30] *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, held land acquired by the United States from a tax defaulter to be exempt from state

[29] The Government, under its charter, was to subscribe to only twenty percent of the stock; its subscription was in fact approximately that proportion throughout the life of the bank. Holdsworth and Dewey, *The First and Second Banks of the United States*, Sen. Doc. No. 571, 61st Cong. 2d Sess.

[30] The tax might well have been construed as laid upon the railroad, but the Court held otherwise (pp. 325–327). It is not wholly clear whether the Court construed the Act to exempt the municipal income or held it invalid as there applied; Justice Bradley concurred on the ground that the Act intended to exempt such income (p. 333). Justices Clifford and Miller dissented on the ground that the city held the railroad bonds in a proprietary capacity.

taxation.[31] *Federal Land Bank* v. *Crosland*, 261 U. S. 374, turned on a statutory provision for immunity, but the decision exempting mortgage recordation from state taxation has since been cited by this Court as a decision based on the Constitution in the silence of Congress.[32] In *Clallam County* v. *United States*, *supra*, the land and physical property of a corporation wholly owned by the Government was held exempt from local taxation, although "no specific words forbid the tax." In *New Brunswick* v. *United States*, 276 U. S. 547, the equitable interest of a wholly owned Government corporation, in land sold with the reservation of a purchase money lien, was held exempt from local taxation; while the city could tax the interest of the mortgagors, the Court held that

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[31] A number of other cases have held, under varying circumstances, that land owned by the United States is exempt from state or local taxation. E. g.: public lands prior to patent or passage of equitable title to private persons: *McGoon* v. *Scales*, 9 Wall. 23; *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444; *Tucker* v. *Ferguson*, 22 Wall. 527, 572; *Colorado Company* v. *Commissioners*, 95 U. S. 259; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219; *Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89. Lands held in trust for Indians: *United States* v. *Rickert*, 188 U. S. 432.

[32] See *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 627; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 389; cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466.

any tax sale must be in subordination to the Government's lien.

In *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, it is true, the Reconstruction Finance Corporation was held subject to state taxation on national bank shares held by it, but this was only because Section 5219 of the Revised Statutes, was construed to permit taxation of those shares by whomever held.[33]

It seems clear enough, therefore, that the Court has uniformly held the operations and the property of the Government itself to be immune from taxation, so long as there is no express waiver of that immunity by Congress. This consistency of decision, in so marked contrast to the cases dealing with private taxpayers, cannot be destroyed by reference either to the economic incidence of the tax burden or to the amenability of the H. O. L. C. to suit.

It may be that much of the economic burden of the tax will be passed on by the H. O. L. C. to its borrowers (see, *supra*, pp. 27–29). But, as has been shown above, when the taxpayer is the Government itself, it is immaterial to its immunity that the cost may ultimately be paid by another.

[33] Even with this inferential support for the tax liability, the Court seems to have underestimated the Congressional reluctance that the Government itself be taxed. The Act of March 20, 1938 (c. 160, 49 Stat. 1185, 12 U. S. C., Supp. IV, 31d), six weeks after the Court's opinion, extended the R. F. C. a retroactive as well as prospective immunity from such taxation. See *infra*, pp. 56–58.

The rule was expressed by Mr. Justice Holmes, in *Johnson* v. *Maryland*, 254 U. S. 51, 55–56, that there is an "entire absence of power on the part of the States to touch," by taxation "the instrumentalities of the United States." Since that case involved the attempt to require a license of a mail-truck driver, the somewhat elusive term "instrumentalities" must be read to refer to the operations of the Government. So understood, the rule is not a relic of an older jurisprudence but a principle which is still unimpaired, either in its vitality or in its authority.

Similarly, it is a matter of no consequence that, even in the silence of Congress, the corporate organization of the H. O. L. C. might have led to an inference that it was intended to be amenable to suit, if at least it had been sired by another corporation itself liable to suit. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. For the "immunity of corporate government agencies from suit * * * is less readily implied than immunity from taxation." *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 235. And, so long as the constitutionality of the H. O. L. C. is not challenged, this Court has already decided that it has the full tax immunity of the United States. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477.

3. *The Waiver of Immunity Must be Clear.*— The tax immunity of the property and the operations of the Government itself is, then, a rule which is reinforced by strong practical reasons and sanc-

tioned by an unbroken line of decisions of this Court. It is a rule of statutory, rather than of constitutional construction, but its consistency gives to the silence of Congress an eloquence and a force which will not often be found in rules based on legislative silence. Compare Bikle, *The Silence of Congress,* 41 Harv. Law Rev. 200; Powell, *The Still Small Voice of the Commerce Clause,* 3 Selected Essays on Constitutional Law 931.

One would expect, then, that the normal tax immunity which attaches to the property and operations of the United States would not be lost except by a waiver which was both express and unequivocal. Such is the rule. "The waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption." *Austin* v. *The Aldermen,* 7 Wall. 694, 699. See *Farmers Bank* v. *Minnesota,* 232 U. S. 516, 528.

In *Graves* v. *N. Y. ex rel. O'Keefe, supra,* pp. 479–480, the Court found the silence of Congress no bar to the taxation of salaries paid government officers and employees, because "the Congressional intention is not to be gathered from the [H. O. L. C.] statute by implication" and because the doctrine of the silence of Congress has little application "to the tax immunity of governmental instrumentalities." Cf. *Helvering* v. *Gerhardt,* 304 U. S. 405, 412. This ruling, urged by the Government as *amicus curiae,* was made with respect to an

immunity claimed by a private person. As we have shown above, the immunity of the Government itself stands upon quite a different footing. Here there is a settled and wholly consistent line of decisions, reflecting the most urgent practical considerations, which demonstrate the normal expectation that the United States will not be required itself to pay taxes to the state governments. The Court truly said (p. 480), of the private taxpayer who claimed immunity from a nondiscriminatory tax, that since "there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." Here there is every ground for implying a "constitutional" immunity of the H. O. L. C. itself, and added strength is lent to the common-sense supposition that the silence of Congress would be intended to continue rather than to destroy the rule which always theretofore had been supposed to apply in the absence of an express waiver of immunity.

B. *The H. O. L. C. Act Contains No Waiver of and Indeed Indicates a Congressional Desire for Immunity*

We have shown that Congress had full power to exempt the mortgages and the recordation transactions of the H. O. L. C. from state taxation. We have shown that, if Congress had remained wholly silent, there would have been an immunity from

state taxation. The only remaining question is whether the Home Owners' Loan Act of 1933, as amended, contains anything which may be construed as a consent to the imposition of the Maryland tax.

That tax, as we have shown (*supra*, p. 14) may be viewed either as a property tax on mortgages, as an excise upon the act of recording mortgages, or as a blend of both. Whatever interpretation be adopted, it seems reasonably clear that the federal statute contains nothing to waive the immunity which otherwise would attach to the H. O. L. C. mortgages and their recordation. Indeed, the implications both of the statute and of its legislative history point with compelling force to a Congressional desire for immunity.

1. *The Language of the Statute.*—Section 4 (c) of the Home Owners' Loan Act of 1933, *infra*, provides:

> The bonds issued by the Corporation * * * shall be exempt * * * from all taxation * * * imposed by * * * any State * * *. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed.

This provision not only fails as a waiver of immunity but affirmatively exempts the H. O. L. C. from the tax here sought to be imposed.

The statute offers a generalized tax exemption of "the Corporation." This broad exemption is quite evidently intended to exempt the H. O. L. C. from all taxes which would be collected from it as a taxpayer. The enumeration of its franchise, loans, etc., is not a provision for specific exemptions, leaving other assets or transactions taxable, but is merely offered as illustrative of what is *included* in the exemption of "the Corporation."

Any thought that the enumeration marks the limit of the exemption is dispelled by the specific exception of real property. Unless tax exemption for real property were thought included in the exemption of "the Corporation," there could have been no occasion for its exception. Since property other than real estate is equally included in the exemption of "the Corporation," a specific exception would be equally necessary for its taxation. Thus, when Congress intended that the tangible personal property of the production credit organizations and the banks for cooperatives should be subject to taxation, the exception of real estate in a similar exemption section was expanded to include tangible personal property. (Sec. 63, c. 98, 48 Stat. 267; 12 U. S. C. 1138c.)

The statute subjects the H. O. L. C. to only one form of taxation, a nondiscriminatory tax on real

property. A mortgage is not real estate,[24] and is therefore not covered by the specific and limited

[24] See *Timms* v. *Shannon*, 19 Md. 296, 314: "In Courts of Equity, a mortgage of lands is regarded as a mere security for money, a chattel interest or chose in action, the debt being considered as the principal, and the mortgage as the accessory or appurtenant thereto." See, also, *Mizen* v. *Thomas*, 156 Md. 313, 318–319; *Washington Fire Ins. Co.* v. *Kelly*, 32 Md. 421.

Sec. 21 of Art. 66 of the Maryland Code, *infra*, provides that a mortgage upon the death of the mortgagee shall devolve on and vest in the mortgagee's executor or administrator. Moreover, Sec. 213 of the Maryland Acts of 1939, *infra*, disjunctively differentiates instruments conveying title to real or personal property and those merely creating liens or incumbrances upon real or personal property.

Under the title theory, accepted to some extent by Maryland courts, the interests of the mortgagee are often considered an interest and estate in the mortgaged land; but that interest or estate "is treated by Courts of law as real estate only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security." *Allen* v. *Nat. State Bank*, 92 Md. 509, 516.

In the majority of the states, either by statutes or by decisions of the courts, the common-law doctrine of mortgages has given place to the equitable theory that a mortgage is nothing more than a mere lien or security for and incidental to a debt, vesting no title or estate in the mortgagee. *Johnson* v. *Razy*, 181 Cal. 342; *Moncrieff* v. *Hare*, 38 Colo. 221; *Evins* v. *Gainesville Nat'l Bank*, 80 Fla. 84; *Phillips* v. *Bond*, 132 Ga. 413; *Hannah* v. *Vensel*, 19 Ida. 796; *Sinclair* v. *Gunzenhauser*, 179 Ind. 78; *Sheakley* v. *Mechler*, 199 Iowa 1390; *Willoughby* v. *Watson*, 114 Kan. 82; *Smith* v. *Berry*, 167 Ky. 646; *Walsh* v. *Robinson*, 135 Mich. 16; *Stitt* v. *Rat Portage Lumber Co.*, 96 Minn. 27; *Morrison* v. *Farmer's & Trader's State Bank*, 70 Mont. 146; *Clark* v. *Missouri K. & T. Trust Co.*, 59 Neb. 53; *Southern Pac. Co.* v. *Miller*, 39 Nev. 169; *Eccles* v. *Will*, 23 N. M. 623; *Beardslee* v. *New Berlin Light Co.*, 207 N. Y. 34; *McClory* v. *Ricks*, 11 N. D. 38; *Moore* v.

exception to the general rule of immunity.[35] The exception was plainly designed simply to prevent the withdrawal from the normal *ad valorem* tax rolls of real estate owned by the H. O. L. C.

Finally, even if it were thought that provision for tax exemption must be found in the specific types of assets and transactions enumerated as included in "the Corporation," it is as probable as not that the Maryland tax is condemned by the exemption granted (a) franchises and (b) loans of the H. O. L. C.

(a) The Home Owners' Loan Act of 1933, as amended, requires that the H. O. L. C. loans "shall be secured by a *duly recorded* home mortgage." Section 4 (e), (f), (d), (g); 12 U. S. C. 1463 (e), (f), (d), (g). Both the mortgage and its recordation were thus an indispensable element in the gigantic lending operations of the H. O. L. C. In a very real sense they could not be taxed without tax-

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Edgeman, 73 Okla. 159; *Stout* v. *Van Zante*, 109 Ore. 430; *Union Nat'l Bank* v. *Cook*, 100 S. C. 99; *West* v. *Middlesex Banking Co.*, 33 S. D. 465; *McCammant* v. *Roberts*, 87 Texas, 241; *Azalia* v. *St. Claire*, 23 Utah, 401; *Cochran* v. *Cochran*, 114 Wash. 499; *Tobin* v. *Tobin*, 139 Wis. 494; *Robinson Mercantile Co.* v. *Davis*, 26 Wyo. 484. This general view must have been that intended by Congress in providing a rule for the operations of the H. O. L. C. in all of the states.

[35] See *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 107; "This section shows, * * * that what Congress intended was that national banks and their property should be free from taxation under state authority, other than taxes on their real property and on shares held by them in other national banks."

ing the H. O. L. C. franchise. See *Osborn* v. *United States Bank*, 9 Wheat. 738, 862; *Morgan* v. *Louisiana*, 93 U. S. 217, 223.

(b) Further, since the Act requires the H. O. L. C. loans to be secured by a duly recorded home mortgage, the Maryland tax on the mortgage when offered for record would seem in every substantial sense to be a tax on the loan itself. As such it is condemned by the exemption of "the Corporation." Indeed, in this particular statute Congress has specifically included "loans" in that exemption. Congress, having declared that the "loan" be exempt, cannot be supposed to have intended that the mortgage security and the recordation, each required of every loan, should be taxable. The chief assets of the H. O. L. C. are its loans; a decision that Congress intended to exempt the loans but not the security required by statute for each loan would impute an irrational nicety of selection to the draftsmen.

Petitioner, it may be noted, concedes that "a direct property tax levied upon the mortgages" would be condemned by Section 4 (c) (Br. 44–45); we see no reason to draw distinctions as to the types of taxes upon mortgages.

2. *The Legislative Background.*—The language of Section 4 (c) seems so plainly to carry exemption from the tax in question that the Court cannot go behind its words. But, even if the legislative intention is searched in the history of the section, the fragmentary legislative background tends to con-

firm rather than to contradict our interpretation of the section. None of the *indicia* of legislative intent are especially persuasive, whether they point in the one direction or the other. We shall, however, set out those which we have found.

(a) The taxation clause of the Home Owners' Loan Act of 1933, Section 4 (c), *infra*, does not differ substantially from that found in several other statutes.[36] Neither the committee reports [37] nor the

[36] Federal Reserve Act, c. 6, Sec. 7, 38 Stat. 251, 258; Federal Farm Loan Act, c. 245, Sec. 26, 39 Stat. 380; Reconstruction Finance Corporation Act, c. 8, Sec. 610, 47 Stat. 5; Federal Home Loan Bank Act, c. 522, Sec. 13, 47 Stat. 735, as amended by Act of May 28, 1935, c. 150, Sec. 8, 49 Stat. 295; Act creating Federal Deposit Insurance Corporation, c. 89, Sec. 12B, 48 Stat. 162, 177, as amended by Section 101 of the Banking Act of 1935, c. 614, 49 Stat. 684, 696, 700; Farm Credit Act of 1933, creating the Central Bank for Cooperatives, the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, c. 98, Sec. 63, 48 Stat. 257, 267; National Housing Act, c. 847, Sec. 402, 48 Stat. 1246, 1256.

[37] Federal Reserve Act: House Rep. No. 69, 63d Cong., 1st Sess., S. Rep. 133, 63d Cong., 1st Sess., Conference Rep. No. 163, 63d Cong., 2d Sess. (51 Cong. Rec. 1352); Federal Farm Loan Act: H. Rep. No. 643, 64th Cong., 1st Sess., S. Rep. No. 144, 64th Cong., 1st Sess., S. Doc. No. 472, 64th Cong., 1st Sess., Conference Rep. No. 844, 64th Cong., 1st Sess. (53 Cong. Rec. 10093); Reconstruction Finance Corporation Act: H. Reps. Nos. 36 and 243, 72d Cong., 1st Sess., S. Rep. No. 1545, 74th Cong., 2d Sess.; Federal Home Loan Bank Act: H. Reps. Nos. 1418, 1775, 1782, 72d Cong., 1st Sess., H. Reps. Nos. 202 and 955, 74th Cong., 1st Sess., S. Rep. No. 438, 74th Cong., 1st Sess.; Act creating Federal Deposit Insurance Corporation: H. Reps. Nos. 150 and 254, 73d Cong., 1st Sess., H. Reps. Nos. 742 and 1822, 74th Cong., 1st Sess., S. Rep. No. 1007, 74th Cong., 1st Sess.; Farm Credit

debates on any of these statutes go very far to illumine the scope of the tax exemption which Congress wished to provide. But the subsequent legislative history of Section 10 of the Reconstruction Finance Corporation Act (c. 8, 47 Stat. 9) affords quite clear indication of the legislative intent. That section[38] is substantially identical with Section 4 (c) of the Home Owners' Loan Act of 1933. In *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, this Court held the R. F. C. liable to state taxation on its national bank shares because Section 5219 of the Revised Statutes provided that *all* shares of national banks could be taxed. Six weeks later, by the Act of March 20, 1936 (c. 160, 49 Stat. 1185; 12 U. S. C., Supp IV, 51d), Congress amended, not the Reconstruction Finance Corporation Act but the Acts relating to national banks, to exempt the R. F. C. from all such taxation, whether past or future. The Committee reports are completely explicit as to the Congressional understanding of the scope of the exemption

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Act of 1933, creating the Central Bank for Cooperatives, the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives: H. Reps. Nos. 171 and 242, 73d Cong., 1st Sess., S. Rep. No. 124, 73d Cong., 1st Sess.; National Housing Act: H. Reps. Nos. 1922, pt. 2, and 2066, 73d Cong., 2d Sess.

[38] It provides in part: "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation * * *; except that any real property of the corporation shall be subject to State * * * or local taxation to the same extent according to its value as other real property is taxed."

intended by provisions such as that now under question. We therefore quote at some length the statement of the House Committee on Banking and Currency (H. Rep. No. 1995, 74th Cong., 2d Sess.):

> Section 10 has generally been understood to assert the broadest possible immunity from the burden of taxation for the Corporation, its assets and its operations. This construction follows from the language of the section which confers tax exemption upon "the Corporation," while specifically consenting to the taxation of real property alone. This construction follows also from the material impairment of the Corporation's operation and effectiveness by any burden of State and Federal taxation, for in furtherance of its purposes the corporation has kept its charges at the lowest rates consistent with sound financing.
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> * * * * *
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> This privilege to tax [in the *Baltimore National Bank* case] has certain unfortunate consequences when applied to activities of the Reconstruction Finance Corporation. Taxation of the preferred shares, notes, or debentures of banks held by the Reconstruction Finance Corporation will not only encroach in all cases upon the small margin between the cost to the Reconstruction Finance Corporation of its money and the return on its investments in banks, but in many cases it will wipe this margin out entirely, impeding the Corporation's operations and leaving it perhaps with an actual substantial loss.

> Moreover, some States do not impose any tax on stock, notes, or debentures of this nature, while the rates in others vary from a small fraction of 1 percent to a percentage which practically exhausts the entire return, bringing an inequality into the relationship of the Reconstruction Finance Corporation and the banks to which it is rendering assistance.
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> * * * * *
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> The committee feels that when Congress enacted section 10 of the Reconstruction Finance Corporation Act, it was intended to give as wide immunity as possible to the functions and activities of the Corporation, and the enactment of the proposed bill will accomplish that intention.

To the same effect, see H. Rep. No. 2199, 74th Cong., 2d Sess.; S. Rep. No. 1545, 74th Cong., 2d Sess.

(b) There is only one legislative indication which we have found which points to an intention to waive the tax immunity which would attach in the silence of Congress. This is the omission in the enumerated immunities of Section 4 (c) of the Home Owners' Loan Act of "mortgages," which is found in the Federal Farm Loan Act.[39] To imply

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[39] Section 26 of that Act (c. 245, 39 Stat. 380; 12 U. S. C. 931) provides:

> Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom,

for the farm-loan mortgages a unique exemption would seem truly "to infer Congressional idiosyncrasy" (*Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 393). But it may be argued that the failure in Section 4 (c) to provide an express exemption for mortgages, similar to that which dictated the decision in *Federal Land Bank* v. *Crosland*, 261 U. S. 374, would indicate a desire to waive their immunity. Either of two considerations, however, shows that such a superficial analysis would be faulty.

(1) In the first place the immunity of mortgages extended not only to those held by the Federal Land Banks and national farm-loan associations, but also to those held by joint-stock land banks. These banks "are privately owned corporations," and "there is nothing in their organization and powers to suggest that they are government instrumentalities." *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 234. Since Congress wished to exempt these mortgages from taxation when held by joint-stock land banks, it could not rely upon the generalized

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shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate. * * * First mortgages executed to Federal land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this chapter, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.

exemption provided for the Federal land banks and the national farm-loan associations. There is no comparable situation here.

(2) In addition, both the joint stock and the Federal land banks have power under the statute [40] to rediscount their mortgages. Congress, desiring the broadest immunity in order to benefit the farm borrower, chose to extend the immunity to the private holders of these mortgages. Since the H. O. L. C. mortgages are held only by the Corporation itself, there was no comparable occasion specifically to exempt those mortgages.

(c) A number of statutes, since the enactment of the tax exemption section of the Federal Reserve Act, have followed that general model.[41] The individual statutes, by and large, vary in minor details each from the other. Except for the debate on the Federal Farm Loan Act, the exemption provisions seem not to have been discussed; neither the committee reports nor the debates show any indication that Congress has attached any significance whatever to the shifting phrasing of the formulae.

This is not surprising. The doctrine of intergovernmental tax immunity had, since *Collector* v. *Day*, 11 Wall. 113, been cast adrift from any specific constitutional provision, and as often as not

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[40] See Sections 13, seventh, and 16 of the Federal Farm Loan Act, *supra*.

[41] See footnote 36, *supra*, p. 55.

was placed by this Court on the nebulous footing of constitutional implication. The decisions of the Court with respect to the immunity of private persons who dealt with the Government seemed beyond reconciliation. The decisions upholding the immunity of the Government itself, however, were uniform and beyond doubt. The enactment of the exemption clauses, therefore, could be expected to receive no more than cursory attention: the exemption was declaratory, and its specific basis—whether constitutional or statutory—was elusive. We think it fair to say that every exemption clause, whatever its precise phrasing, was intended to serve merely as an unnecessary notice that the customary tax exemption of the Government would attach.

CONCLUSION

We have shown that Congress has full power either to exempt H. O. L. C. mortgages and their recordation from taxation or to waive the immunity; that if Congress were silent, tax immunity for the H. O. L. C. property and operations would be the rule; and that Congress, instead of remaining silent, has by express enactment, reinforced by inferences from the legislative background, declared that the H. O. L. C. should be exempt from all taxation save that on its real property. For these reasons, we respectfully submit that the

decision of the Court of Appeals of Maryland should be affirmed.

ROBERT H. JACKSON,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
WARNER W. GARDNER,
BERRYMAN GREEN,
Special Assistants to the Attorney General.
JOHN F. MCCARTNEY,
Attorney.

HAROLD LEE,
General Counsel,
Home Owners' Loan Corporation.

OCTOBER 1939.

APPENDIX

Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, as amended:

SEC. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

* * * * *

(c) * * * The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation

to the same extent, according to its value, as other real property is taxed. (U. S. C., Title 12, Sec. 1463.)

Laws of Maryland, 1937, Special Session, c. 11:

SEC. 4. *And be it further enacted,* That three new sections be and they are hereby added to Article 81 of the Annotated Code of Maryland (1935 Supplement), to be under the subtitle "Tax on the Recordation of Instruments in Writing," said new sections to be known as Sections 213 and 214, to follow immediately after Section 212 of said Article, and to read as follows:

213. A tax is hereby imposed upon every instrument of writing recorded or offered for record with the clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction.

The tax hereby imposed shall be at the rate of 10c for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and

at the rate of 10c for each $100, or fractional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt.

In addition to the tax hereby imposed, the Clerks shall collect a charge of 50c for each such instrument recorded or offered for record.

214. No such instrument shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. The Comptroller shall supply to the Clerks of the Circuit Courts of the respective Counties or the Clerk of the Superior Court of Baltimore City, stamps to evidence the payment of said tax, for sale to persons offering such instruments for record, under such rules and regulations as the Comptroller may prescribe. The proceeds from the sale of said stamps, together with the recordation charges herein provided, shall be accounted for and paid over to the Comptroller who shall deposit the same in the "State Fund for Aid to the Needy" to be disbursed therefrom for the purposes and in the manner prescribed by law.

It shall be unlawful for any person to record any written instrument referred to in this subtitle without having provided for the payment of the tax and recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction. Any person violating the provisions of this subtitle shall be subject to a fine of not more than $500.00 or to a sentence of not more than six months in jail.

Maryland Acts of 1939, c. 277 (Revenue Act):

SEC. 6. *And be it further enacted,* That Sections 213 and 214 of Article 81 of the Annotated Code of Maryland (1935 Supplement) Title "Revenue and Taxes," subtitle "Tax on the Recordation of Instruments in Writing," as the same were enacted by Chapter 11 of the Acts of the Special Session of 1937, be, and the same are hereby repealed and reenacted with amendments so as to read as follows:

213. A tax is hereby imposed upon every instrument of writing conveying title to real or personal property, or creating liens or incumbrances upon real or personal property, offered for record and recorded * * *. The term "instruments of writing" shall include * * * mortgages * * *.

In the case of instruments conveying title to property, the tax shall be at the rate of 10c for each $100 of the actual consideration paid or to be paid; in the case of instruments securing a debt, the tax shall be at the rate of 10c for each $100 of the principal amount of the debt secured. In addition to the tax imposed, the Clerks shall collect a charge of 50c for each instrument offered for record and recorded, upon which a tax is payable hereunder.

* * * * *

214. No instrument subject to the tax imposed by this sub-title, shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. * * *

It shall be unlawful for any person to record any instrument subject to the tax imposed by this sub-title, or to incur any additional debt secured by an instrument

previously recorded, with respect to which additional debt a tax is required to be paid, without having provided for the payment of the tax and recordation charge * * *.

Maryland Code, Annotated, 1924, Vol. 2, Art. 66:

21. On the death of a mortgagee of lands, his interest and estate in the mortgaged premises together with his right to the debt thereby secured shall devolve on and vest in his executor or administrator.

22. The executor or administrator of any mortgagee, or the assignee, or the executor or administrator of any assignee of any mortgagee who is legally and equitably entitled to receive the mortgage debt, or where the mortgage debt has been paid in the lifetime of the mortgagee, may release a mortgage in the same manner and by the same means that a mortgagee can release.

U. S. GOVERNMENT PRINTING OFFICE: 1933

pp. 3, 4, 1;

SUPREME COURT OF THE UNITED STATES.

No. 10.—October Term, 1939.

M. Luther Pittman, Clerk of the Superior Court of Baltimore City, Petitioner,
vs.
Home Owners' Loan Corporation of Washington, D. C.

On Writ of Certiorari to the Court of Appeals of the State of Maryland.

[November 6, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Home Owners' Loan Corporation brought this proceeding in the Baltimore City Court for a writ of mandamus requiring the Clerk of the Superior Court of Baltimore to record a mortgage executed to the Corporation upon the payment of the ordinary recording charge and without affixing stamps for the state recording tax. Demurrer to the petition was overruled, the Clerk did not avail himself of the opportunity to answer; and mandamus was granted. The order was affirmed by the Court of Appeals. — Md. —. We granted certiorari. 306 U. S. 628. 175 512; 2A. 2d 689.

The Maryland statute imposes a tax upon every mortgage, recorded or offered for record, at the rate of ten cents for each $100, or fraction thereof, of the principal amount of the debt secured by the mortgage.[1] As the Home Owners' Loan Corporation is ex-

[1] The Act provides for a "Tax on the Recordation of Instruments in Writing" as follows:

"A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property, or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages, purchase money mortgages, absolute or partial releases, or orders of satisfaction".

"The tax hereby imposed shall be at the rate of 10¢ for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the

pressly declared to be an instrumentality of the United States (Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128) and the mortgage was acquired in that capacity, the Court of Appeals held the tax as thus applied to be invalid.

The court relied upon our decision in *Federal Land Bank* v. *Crosland*, 261 U. S. 374. The question there related to a tax imposed by Alabama as a condition for the recording of a mortgage executed to a Federal Land Bank. The Federal Farm Loan Act of 1916 provides that first mortgages executed to Federal Land Banks shall be deemed "instrumentalities of the Government of the United States and as such they and the income derived therefrom shall be exempt from Federal, State, municipal and local taxation": 39 Stat. 360, 380. We held that the state tax, as distinguished from a reasonable fee to meet the expenses of the registry, constituted a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it, and that the tax on the mortgage in question was beyond the power of the State.

Petitioner suggests that the *Crosland* case may be distinguished; that the Alabama tax was imposed on the lender, whereas the Maryland tax is on the privilege of recording the instrument and the statute is silent as to the one who shall pay the tax; also that the Federal Farm Loan Act expressly declared the mortgages of Federal Land Banks to be instrumentalities of the Federal Government. The Court of Appeals thought these differences to be immaterial. As to the first, the court rightly observed that in the *Crosland* case the provision for the payment of tax by the lender was regarded as having no determining significance. We said that "whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States". 261 U. S., pp. 378, 379. Here, also, the tax is imposed upon the mortgage and is

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property transferred, in the case of instruments conveying title, and at the rate of 10¢ for each $100, or fractional part thereof, of the principal amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt".

"In addition to the tax hereby imposed, the Clerks shall collect a charge of 50¢ for each such instrument recorded or offered for record". Acts of 1937, Chap. 11, Code of Maryland, Art. 81, sec. 213.

The same Act, in Section 214, provides for the affixing of stamps to cover the tax and makes it unlawful for any person to record any written instrument without providing for the payment of the tax, as stated.

graded according to the amount of the loan,[2] and the condition attached to the registration is a practical method of collection. The recording sought was for the protection of the interest of the Home Owners' Loan Corporation. In fact, the mortgage in the instant case was offered for record by the Corporation and the tax was demanded from the Corporation.

The second suggested distinction rests upon the terms of the Home Owners' Loan Act. That provides[3] that the Home Owners' Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes. The critical term, in the present relation, is *"loans"*. We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security. The Home Owners' Loan Act requires that the loans made by the Corporation "shall be secured by a duly recorded home mortgage".[4] Both the mortgage and its recordation were indispensable elements in the lending operations authorized by Congress. We agree with the state court that there is no sound distinction which makes inapplicable the reasoning which was decisive in the *Crosland* case.

Alive to this consideration, petitioner advances a broader contention, asking us to review and overrule the *Crosland* decision as being out of harmony with correct principle. Petitioner insists that the tax is not discriminatory; that it does not impose a burden upon the Home Owners' Loan Corporation; and that if the Act of Congress be construed as conferring an immunity, it went beyond the power of Congress, as Congress cannot "grant an immunity of greater extent than the constitutional immunity".

We assume here, as we assumed in *Graves* v. *New York ex rel. O'Keefe*, that the creation of the Home Owners' Loan Corporation

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[2] See Note 1. → 306 U.S. 466,

[3] Section 4(c) of the Home Owners' Loan Act provides: "The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed". 48 Stat. 128, 130; 12 U. S. C. 1463.

[4] Section 4(c)(f); 48 Stat. 131; 12 U. S. C. 1463 (c)(f).

was a constitutional exercise of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. *McCulloch* v. *Maryland*, ~~supra, pp.~~ 421, 422; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 208, 209; *Graves* v. *New York ex rel. O'Keefe*, *supra*. Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. "A power to create implies a power to preserve". *McCulloch* v. *Maryland*, *supra*, p. 426. This power to preserve necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. 1, sec. 8, par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field. *The Shreveport Case*, 234 U. S. 342, 351, 352. The exercise of this protective power in relation to state taxation has many illustrations. See, e.g., *Bank* v. *Supervisors*, 7 Wall. 26, 31; *Châte* v. *Trapp*, 224 U. S. 665, 668, 669; *Smith* v. *Kansas City Title Co.*, *supra*, p. 207; *Trotter* v. *Tennessee*, 290 U. S. 354, 356; *Lawrence* v. *Shaw*, 300 U. S. 245, 249. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. VI.

The judgment of the state court is affirmed.

Affirmed.

Mr. Justice BUTLER took no part in the consideration and decision of this case.